

1959

# The Constitution and the Transitory Cause of Action

Brainerd Currie

Follow this and additional works at: [https://chicagounbound.uchicago.edu/journal\\_articles](https://chicagounbound.uchicago.edu/journal_articles)



Part of the [Law Commons](#)

---

## Recommended Citation

Brainerd Currie, "The Constitution and the Transitory Cause of Action," 73 Harvard Law Review 36 (1959).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

# THE CONSTITUTION AND THE "TRANSITORY" CAUSE OF ACTION †

Brainerd Currie \*

*The author, using as his starting point two statements of the Supreme Court in a recent conflict-of-laws case, develops a theory which may be the unexpressed basis of decisions purportedly grounded on the full-faith-and-credit clause. He searches for a consistent rationale which will clarify a state's obligation to provide a forum for causes of action of foreign origin and will also define the limits within which the state may refuse to entertain the action because of local court-administration policy.*

## I. STATEMENT

IN *Hughes v. Fetter*<sup>1</sup> the Supreme Court confronted the legal profession with a seeming paradox. Reversing the Supreme Court of Wisconsin,<sup>2</sup> the Court held that a state may not, consistently with the full-faith-and-credit clause,<sup>3</sup> refuse to entertain an action for wrongful death predicated upon the laws of a sister state wherein the injury and death occurred. At the same time, in a rather cryptic footnote, the Court reserved the possibility that a state in the position of Wisconsin, having entertained the action for wrongful death, might constitutionally apply its own law rather than that of the state of injury "to measure the substantive rights involved."<sup>4</sup> To say the least, this decision seems to require only limited and partial, rather than full, faith and credit. Wisconsin must entertain the action because the Constitution requires recognition of the public acts of the state of injury — specifically, the wrongful-death statute of Illinois — by which the right of action is created. But the obligation

---

† This is the first installment of a two-part article.

\* Professor of Law, The University of Chicago. LL.B., Mercer Univ., 1935, A.B. 1937, LL.M., Columbia, 1941, J.S.D. 1955.

<sup>1</sup> 341 U.S. 609 (1951).

<sup>2</sup> *Hughes v. Fetter*, 257 Wis. 35, 42 N.W.2d 452 (1950).

<sup>3</sup> U.S. CONST. art. IV, § 1.

<sup>4</sup> 341 U.S. at 612 n.10.

to recognize the Illinois statute and the rights stemming from it is discharged by Wisconsin's mere acceptance of the case; thereafter Wisconsin may apply its own law rather than that of Illinois as the rule of decision.

To state the matter somewhat more strongly, the decision apparently endorsed two inconsistent philosophies of the conflict of laws. The language of the opinion proper is a dismaying restatement of the *obligatio* theory,<sup>5</sup> or territorialist theory of vested rights, ominously suggesting restoration of that theory to the constitutional status which it had enjoyed for a brief and unfortunate period;<sup>6</sup> Wisconsin's asserted policy was found in conflict with "the strong unifying principle embodied in the Full Faith and Credit Clause looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states . . . ." <sup>7</sup> At the same time, the Court's footnote reaffirmed the very analysis which had dethroned the *obligatio* theory and confirmed the freedom of the forum state to apply its own law and policy whenever it has a legitimate interest in so doing: <sup>8</sup>

The present case is not one where Wisconsin, having entertained appellant's lawsuit, chose to apply its own instead of Illinois' statute to measure the substantive rights involved. This distinguishes the present case from those where we have said that "*Prima facie* every state is entitled to enforce in its own courts its own statutes, lawfully enacted." <sup>9</sup>

The piquancy of the paradox is heightened if *Hughes v. Fetter* is read, as it must be read, against the background of such cases as *Tennessee Coal, Iron & R.R. Co. v. George*.<sup>10</sup> There the Court held that the full-faith-and-credit clause did not prevent the

---

<sup>5</sup> See *Cuba R.R. v. Crosby*, 222 U.S. 473 (1912); *Slater v. Mexican Nat'l R.R.*, 194 U.S. 120, 126 (1904).

<sup>6</sup> See *Hartford Acc. & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934); *Mutual Life Ins. Co. v. Liebing*, 259 U.S. 209 (1922); *New York Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918); *Western Union Tel. Co. v. Brown*, 234 U.S. 542 (1914); Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958).

<sup>7</sup> 341 U.S. at 612.

<sup>8</sup> See Currie, *supra* note 6.

<sup>9</sup> 341 U.S. at 612 n.10.

<sup>10</sup> 233 U.S. 354 (1914). See also *Atchison, T. & S.F. Ry. v. Sowers*, 213 U.S. 55 (1909).

Georgia courts from entertaining an action under the Alabama Employers' Liability Act although the same public act which created the right stipulated that actions to enforce it "must be brought in a court of competent jurisdiction within the State of Alabama, and not elsewhere."<sup>11</sup> Quite possibly the meaning of *Hughes v. Fetter* was that Georgia in such a case not only may but must entertain such an action — because the Constitution requires full faith and credit to the public acts (or to selected portions of the public acts) of Alabama. Moreover, the footnote in *Hughes v. Fetter* seems inconsistent with a dictum in *George*: "The courts of the sister State trying the case would be bound to give full faith and credit to all those substantial provisions of the statute which inhered in the cause of action or which name conditions on which the right to sue depend [*sic*]."<sup>12</sup> Indeed, two years later, in *Wells v. Simonds Abrasive Co.*,<sup>13</sup> the Court held that a United States district court in Pennsylvania, while presumably required by the full-faith-and-credit clause to entertain an action for wrongful death predicated upon an Alabama statute, was not required to apply the portion of the Alabama statute which provided that an action must be brought within two years of the date of death, but was free to apply Pennsylvania's one-year statute of limitations.<sup>14</sup> In short, because of the respect which the Constitution requires each state to give to the public acts of sister states, the forum may not refuse to entertain an action predicated on the laws of another state; but the forum need not, and probably must not, respect a localizing provision of the foreign law; and, having entertained the action, the forum need

---

<sup>11</sup> Ala. Civ. Code § 6115 (1907). The relevant section of the Employers' Liability Act is § 3910 (now ALA. CODE tit. 26, § 326 (1940)). See 233 U.S. at 358.

<sup>12</sup> 233 U.S. at 360. See also *Atchison, T. & S.F. Ry. v. Sowers*, 213 U.S. 55, 70 (1909).

<sup>13</sup> 345 U.S. 514 (1953).

<sup>14</sup> Formerly, the Alabama wrongful-death statute contained the same qualification, purporting to limit actions to the Alabama courts, which was involved in the *George* case. The effect of this qualification was not before the Court in *Wells* only because, in deference to the decision in *George*, the provision had been deleted in the codification of 1940. See ALA. CODE tit. 7, § 63 (1940).

Cf. Frankfurter, J., dissenting, in *Carroll v. Lanza*, 349 U.S. 408, 415 (1955): "[T]he forum cannot, by statute or otherwise, refuse to enforce a sister-state statute giving a transitory cause of action, whether in contract or tort. . . . Indeed, the forum may permissibly go a step in the other direction and disregard the venue provisions of an out-of-state statute which would have prevented the forum from enforcing the right."

not necessarily apply the foreign law but, at least *prima facie*, is entitled to apply its own. What kind of "full faith and credit" is this?

The decision in *Hughes v. Fetter*, assessed largely at face value and without much regard for these complications, was on the whole well received.<sup>15</sup> True, there was — as there still is<sup>16</sup> — a segment of opinion reluctant to take seriously the Supreme Court's repeated holdings that the due-process and full-faith-and-credit clauses operate to limit the freedom of state courts in deciding questions of conflict of laws even where judgments are not involved.<sup>17</sup> The decision, however, was in accord with prevailing conflict-of-laws doctrine, and the translation of that doctrine to the constitutional level evoked more approval than criticism. The case was an "X-F" case:<sup>18</sup> all of the relevant "contacts," or "connections," of the "occurrence" were associated with Illinois;<sup>19</sup> it was not doubted that, therefore, the law of Illinois determined the rights of the parties;<sup>20</sup> the "better view," disdaining provincialism, strongly favored the uniform interstate enforcement of rights so determined, and deprecated the invocation of "local public policy" to defeat such enforcement unless the grounds of policy were very strong.<sup>21</sup> The majority opinion and the result being in harmony with this point of view, there was a tendency simply to ignore the dissonant note sounded in the margin.<sup>22</sup> Professor Cheatham has resolved the conflict squarely in favor of the text of the opinion:

---

<sup>15</sup> Some twenty-five legal periodicals published comments either on the Supreme Court's decision or on the decision of the Supreme Court of Wisconsin. For the complete list, see 9 & 10 INDEX TO LEGAL PERIODICALS (1952, 1955).

<sup>16</sup> See EHRENZWEIG, CONFLICT OF LAWS 12 (1959).

<sup>17</sup> See, e.g., 9 WASH. & LEE L. REV. 55 (1952); 100 U. PA. L. REV. 126 (1951).

<sup>18</sup> See CHEATHAM, GOODRICH, GRISWOLD & REESE, CASES ON CONFLICT OF LAWS 3 (4th ed. 1957).

<sup>19</sup> Cf. Cheatham, *Federal Control of Conflict of Laws*, 6 VAND. L. REV. 581, 585, 590 n.29 (1953).

<sup>20</sup> RESTATEMENT, CONFLICT OF LAWS § 391 (1934).

<sup>21</sup> *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 120 N.E. 198 (1918); RESTATEMENT, CONFLICT OF LAWS § 612 (1934); Beach, *Uniform Interstate Enforcement of Vested Rights*, 27 YALE L.J. 656 (1918); Goodrich, *Foreign Facts and Local Fancies*, 25 VA. L. REV. 26 (1938).

<sup>22</sup> Some commentators dealt with this difficulty by explaining that the decision was concerned only with access to courts and not with choice of law. See, e.g., Reese, *Full Faith and Credit to Statutes: The Defense of Public Policy*, 19 U. CHI. L. REV. 339, 345-46 (1952); Comment, 37 CORNELL L.Q. 441, 445-52 (1952); 21 U. CINC. L. REV. 188, 189 (1952). The distinction is important, but is neither self-explanatory nor self-justifying.

The requirement of full faith and credit to "public acts," *i.e.*, statutes, means full faith and credit to private rights arising from them. The principal purpose of public statutes is to create private rights based on occurrences to which they apply. So, if an occurrence takes place wholly in Illinois, the public acts of Illinois create rights in the parties to the occurrence. If a suit based on the Illinois occurrence is brought in Wisconsin, the Constitution and the federal statute, literally applied, affirmatively direct Wisconsin to give the same credit to the rights under the Illinois law that the State of Illinois itself would do.<sup>23</sup>

Another commentator would have gone farther than the Court, which noted with restraint that "full faith and credit does not automatically compel a forum state to subordinate its own statutory policy to a conflicting public act of another state . . . ." <sup>24</sup> He seriously questioned whether a state should ever be permitted to close its courts, on grounds of public policy, to a cause of action arising under the laws of a sister state, and called for a "hard-and-fast" rule requiring the states to entertain sister-state causes of action.<sup>25</sup>

But there is not, and should not be, any "hard-and-fast" rule requiring Wisconsin to enforce the Illinois wrongful-death statute in a situation such as that of *Hughes v. Fetter*. The Court's footnote is not to be taken lightly. It means exactly what it says. Indeed, all the propositions which have been stated here on the basis of the *Hughes*, *George*, and *Wells* cases are probably reliable, paradoxical though they may seem: Wisconsin may not refuse to entertain the action for wrongful death; the obligation to provide a forum would be the same even if the law of Illinois purported to restrict the right of action to Illinois courts; yet Wisconsin is not required to apply the Illinois wrongful-death statute, but

---

<sup>23</sup> Cheatham, *supra* note 19, at 585. See also Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405, 499 n.231 (1955).

<sup>24</sup> 341 U.S. at 611.

<sup>25</sup> Reese, *supra* note 22, at 346. Professor Reese carefully limited his position, noting that *Hughes v. Fetter* was not concerned with the impact of full faith and credit on choice of law and that Wisconsin's refusal to entertain the action was not based upon the doctrine of forum non conveniens nor on its inability to afford the remedy contemplated by the Illinois act. *Id.* at 343-46. Nevertheless, the scope of his proposed "hard-and-fast" rule remains unclear: "To be sure, entertainment of a sister state's cause of action . . . does require the forum court to apply the law of another jurisdiction. But this burden is only one of the costs of a federal system . . . ." *Id.* at 346.

may apply its own instead. If these propositions are to stand together, however, it is evident that there must be a reordering of the constitutional and conflict-of-laws theories on which they rest; they cannot consistently be derived from the hodge-podge of territorialism, vested rights, full faith and credit, natural law, literalism, and governmental-interest analysis which is found in the cases.

The purpose of this paper is to examine the constitutional obligation of a state to provide a forum for causes of action having foreign aspects. Necessarily included is the correlative question of the effect of the Constitution upon the power of a state to provide that its laws shall be enforced only in its own courts. The problem is part of a broader topic which has been called "access to courts,"<sup>26</sup> the emphasis here being upon the power of a state to refuse a forum because of considerations of local public policy.<sup>27</sup> The precise scope of the inquiry will be even narrower, since an important distinction must be drawn between two different types of policy considerations, only one of which is directly involved. The distinction is not one which can be stated in a phrase.

A court confronted with an action having foreign aspects may (in the context of the problem under discussion) do one of four things:

- (1) It may adjudicate the case in accordance with the law of the forum;
- (2) It may adjudicate the case in accordance with foreign law;
- (3) It may concede that the rights of the parties are governed by foreign law, but refuse to apply that law in passing upon the claim or defense because of disagreement with the foreign legal policy;

---

<sup>26</sup> RESTATEMENT, CONFLICT OF LAWS ch. 12, topic 4 (1934). It should be noted, however, that "the extent to which the Constitution of the United States may require a State to exercise jurisdiction through its courts is not considered in the Restatement of this Subject." *Id.* Scope Note.

<sup>27</sup> RESTATEMENT, CONFLICT OF LAWS § 612 (1934). See also *id.* § 617 ("State Creating Right cannot Prevent Its Enforcement in Other States").

This discussion will not deal comprehensively with the entire question of the extent to which the Constitution requires a state to provide a forum for a cause of action having foreign aspects. In particular, the effect of the equal-protection and privileges-and-immunities clauses must be reserved for separate treatment. The emphasis here is upon the effect, or supposed effect, of the full-faith-and-credit clause upon access to courts. *Cf.* Hilpert & Cooley, *The Federal Constitution and the Choice of Law*, 25 WASH. U.L.Q. 27, 35-36 (1939). The equal-protection and privileges-and-immunities clauses will be discussed only to the extent that the cases make such discussion necessary.

(4) It may concede that the foreign law is applicable, and interpose no disagreement with the policy of that law; nevertheless, it may refuse to entertain the action because of a local policy relating to administration of the courts.

It is the fourth course of action, as distinguished from the third, which is the focal point of this discussion.

The third course should not be tolerated in our federal system, with its constitutional restraints upon choice of law. That is to say, it should not be tolerated provided the system for determining when foreign law is controlling is a rational one, constructed with due regard for the legitimate interests of the states. Under the traditional system of conflict of laws, which often designates the controlling law on the basis of "connecting factors" having no rational relation to state interests, local public policy as employed in the third course is a necessary escape device, avoiding the application of foreign law where that would produce an unacceptable result. When, in the context of a constitutional requirement of full faith and credit, we permit a state to disregard the "applicable" foreign law merely because it finds that law distasteful, we simply give testimony that the foreign law was not "applicable," in any exclusive sense, in the first place.<sup>28</sup> A more rational system would provide for determining the exclusively applicable law — where that is possible — by analysis of the governmental interests involved. This has been the system employed, in the main, by the Supreme Court in the choice-of-law cases arising under the due-process and full-faith-and-credit clauses.<sup>29</sup> Under such a system, a state is justified in applying its own law when the circumstances are such as to give it a legitimate interest in applying the policy which that law embodies. It is not justified in applying its own law when the foreign state has such an interest and the forum state has none. When this is the situation, the full-faith-and-credit clause, if it means anything, means that the forum state must defer to the law of the only state having an interest in the application of its law and policy; there is no room for an inconsistent "local public policy," since it has already been determined that the forum state has no legitimate interest in the matter. The

---

<sup>28</sup> See generally Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958).

<sup>29</sup> *Ibid.*



interposition of its own policy notions would be officious inter-meddling.<sup>30</sup>

The problem raised by the fourth course of action is somewhat different. The court in which the action is filed may in all sincerity concede that the foreign state has a legitimate interest in the application of its legal policy, and that the forum state has no interest in the application of a contradictory policy. Having no such connection with the transaction or with the parties as to give it a legitimate basis for an interest, the forum state will not presume to substitute its own conception of what constitutes sound social or economic policy in the disposition of the case. Indeed, the court may heartily agree with the foreign policy; the forum state may even pursue an identical policy within its own sphere of interest. Yet the forum state also has policies relating to the conduct of its judicial establishment, and these may be called into play by the assertion of the foreign-based claim. In short, the forum state, though it is not in position to assert its own ideas of social and economic policy in opposition to those of the foreign state, does have a legitimate interest in the application of any policy relating to the administration of its courts, despite the fact that such a policy may prevent enforcement of the foreign claim.

When the legitimate interests of two states are in conflict with respect to social or economic policy, the question of the law which should be applied involves a political judgment which can properly be made only by Congress in the exercise of its powers under the full-faith-and-credit clause.<sup>31</sup> It cannot be resolved by the courts according to any rational jurisprudence of conflict of laws.<sup>32</sup> Either state may apply its own law and policy without violating any constitutional principle. It may be that the same result follows when the social or economic policy of one state encounters resistance not on its merits but because of an independent policy of the forum state relating to judicial administration. On the

---

<sup>30</sup> Under such a system, though not under the present system, which determines the "applicable" law by reference to "contacts" which are often irrelevant to state interests, there is justification for Judge Beach's characterization of the defense of local public policy as "an intolerable affectation of superior virtue." Beach, *supra* note 21, at 662.

<sup>31</sup> See COOK, *The Powers of Congress Under the Full Faith and Credit Clause*, 28 YALE L.J. 421 (1919), in *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* ch. IV (1942).

<sup>32</sup> See Currie, *The Constitution and the Choice of Law: Governmental Interest and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958).

other hand, it is possible that the policy relating to judicial administration is of a different and inferior order, and that it should yield to the policy whereby the rights of the parties are concededly determined. These are the possible solutions of the problem to which this paper is addressed.

*Hughes v. Fetter* is hardly typical of the cases which give rise to the problem, but it provides a good point of departure for the discussion.

## II. DEATH IN ABSENTIA

How would the result in *Hughes v. Fetter* have been affected if the fatal collision had occurred in Ontario instead of in Illinois? The answer should be: Not at all. The hypothetical case is not materially different from the actual one. Precisely the same considerations which lead to the conclusion that Wisconsin is required by the Constitution to provide a forum in the actual case lead to the same conclusion in the hypothetical case. Obviously this cannot be true if the full-faith-and-credit clause is the basis of the decision, since that clause makes no reference to the laws of foreign countries and their political subdivisions. I submit, however, that a different constitutional principle dictated the result in *Hughes v. Fetter*, and that full faith and credit has nothing to do with the case.

This may appear to some to be an impertinent observation, in view of the fact that the Court squarely grounded its decision on the full-faith-and-credit clause; but it should not be a surprising one. We have already seen how the Court, in its tenth footnote, gave notice that it did not really mean to say that Wisconsin was required to give full faith and credit to the public acts of Illinois. There is no escape from Professor Cheatham's proposition that full faith and credit to the public acts of a state means full faith and credit to the private rights created by those acts.<sup>33</sup> Since Wisconsin was not required to determine the rights of the parties in accordance with the Illinois statute, but was free to apply its own law, it is clear that the full-faith-and-credit clause was not operating as it operated, for example, in *Bradford Elec. Light Co. v. Clapper*<sup>34</sup> and *Order of United Commercial Travelers v.*

---

<sup>33</sup> See pp. 39-40 *supra*.

<sup>34</sup> 286 U.S. 145 (1932).

*Wolfe*,<sup>35</sup> in which application of the law of the forum was denounced by the Court. Something other than the command of full faith and credit to the public acts of sister states required Wisconsin to entertain the action.

*Hughes v. Fetter* has been regarded as a case in which all the factors, or "contacts," relevant to choice of the appropriately applicable law were associated with Illinois.<sup>36</sup> In terms of the traditional system of conflict of laws this is an accurate appraisal; the only relevant circumstance, according to that system, is that the fatal injury occurred in Illinois.<sup>37</sup> In terms of an analysis of the interests of the respective states, however, the converse is true: given the governmental policies which may reasonably be inferred from a wrongful-death statute, and the relationship of the parties and events to the respective states, it is abundantly clear that Wisconsin was, or should have been, concerned with the outcome, and that Illinois had little or no basis for an interest in the matter.

Harold Hughes, the young man who was killed, was a resident of Wisconsin. So was his father, who, as administrator, was plaintiff in the action. So was the defendant, Glenn Fetter, who was the driver of the car in which Hughes was a passenger. The corporate defendant, which had issued a policy of casualty insurance covering the Fetter car, was a Wisconsin corporation. Hughes was survived by his father and stepmother, both of Wisconsin, and by a brother who was a resident of Illinois.<sup>38</sup> These human facts are treated as completely irrelevant by the traditional system of conflict of laws. They are highly significant, however, in any discussion of the legitimate scope of a state's governmental concern, and they ought to have significance in any system of conflict of laws which is not totally divorced from reality.

The governmental policy embodied in a wrongful-death statute is reasonably clear. Lord Campbell's Act,<sup>39</sup> which provided the model for the Wisconsin and Illinois statutes, was entitled "An Act for compensating the Families of Persons killed by Acci-

---

<sup>35</sup> 331 U.S. 586 (1947).

<sup>36</sup> See Cheatham, *Federal Control of Conflict of Laws*, 6 VAND. L. REV. 581 (1953); cf. Reese, *Full Faith and Credit to Statutes: The Defense of Public Policy*, 19 U. CHI. L. REV. 339 (1952).

<sup>37</sup> RESTATEMENT, CONFLICT OF LAWS § 391 (1934).

<sup>38</sup> Record, pp. 4-6, 13, 20, 26; Brief for Appellee, p. 3.

<sup>39</sup> 9 & 10 Vict., ch. 93 (1846).

dents." The preamble, after reciting the absence of a remedy at common law, declared that "it is oftentimes right and expedient that the Wrongdoer in such Case should be answerable in Damages for the Injury so caused by him . . . ." Section II provided that "the Jury may give such Damages as they may think proportioned to the Injury resulting from such Death to the Parties . . . for whose Benefit such Action shall be brought . . . ." As the Minnesota court said simply, "The object of the statute was to remedy the harshness of the common law, and in some degree compensate those dependent upon the person killed."<sup>40</sup> Under the Illinois statute no action can be maintained unless there is a qualified beneficiary and a showing of pecuniary loss,<sup>41</sup> and the same is true under the Wisconsin statute.<sup>42</sup> In its domestic context, such a statute represents a choice between conflicting interests of individuals: as between members of the community who have suffered because of a death and the member whose fault was the cause, the loss is to be borne by the latter.

The question then becomes: How should the statute be applied to cases which are not wholly domestic in order to effectuate the community's policy? Rather clearly, its benefits should be made available whenever those who are the objects of its protection are members of the community—*i.e.*, residents or domiciliaries of the state. In one sense, perhaps, it is the dependent relatives who are the object of the state's concern. Such beneficiaries, however, may be numerous and scattered, so that to administer the statute on the basis of the residence of each of them would be a cumbersome business, to say the least. Understandably, then, a state might, for simplicity if for no other reason, focus upon the deceased person as the object of its concern.<sup>43</sup> It is not necessary, in order to justify this choice, to "presume" that the residence of the beneficiaries follows that of the deceased, nor to indulge in dubious generalizations to the effect that dependent relatives usually live

---

<sup>40</sup> *Renlund v. Commodore Mining Co.*, 89 Minn. 41, 47, 93 N.W. 1057, 1059 (1903).

<sup>41</sup> ILL. REV. STAT. ch. 70, §§ 1, 2 (1957); *North Pier Terminal Co. ex rel. Liberty Mut. Ins. Co. v. Hoskins Coal & Dock Corp.*, 402 Ill. 192, 83 N.E.2d 748 (1949).

<sup>42</sup> WIS. STAT. §§ 331.03-04 (1957); *Swanson v. State Farm Mut. Auto. Ins. Co.*, 264 Wis. 274, 58 N.W.2d 664 (1953); *Herro v. Steidl*, 255 Wis. 65, 37 N.W.2d 874 (1949); *Brown v. Chicago & N. Ry.*, 102 Wis. 137, 77 N.W. 748 (1899).

<sup>43</sup> Cf. Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 221-22 (1958).

with their benefactor. In life-insurance cases the courts tend to assume that the protective policies of a state are directed toward the insured rather than the beneficiaries.<sup>44</sup> If the deceased is within the scope of the state's protective policy, the courts have seldom denied the benefits of a wrongful-death statute solely on the ground that the claimant is a nonresident, even when he is an alien.<sup>45</sup> Indeed, the protection afforded by a wrongful-death statute is comparable to that afforded by a policy of insurance against accidental death: each resident of the state is assured that, in the event his death is caused by the wrong of another, his dependents will have a right to indemnity from the wrongdoer. The resident himself benefits from this assurance; it is valuable to him in the same way that a contract of accident insurance payable to his dependents would be.<sup>46</sup>

We may, therefore, conclude that Wisconsin should logically desire that the benefits provided by its statute should be available whenever the deceased was a resident, or domiciliary, of Wisconsin.<sup>47</sup> From the standpoint of Wisconsin's interests the place where the injury occurred is totally irrelevant. It is true that this fact was not appreciated by the Wisconsin legislature. The statute creating the right of action for wrongful death expressly provided that it should apply only to deaths "caused in this state."<sup>48</sup> This, however, is the very provision whose constitutionality is un-

---

<sup>44</sup> See Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 38 (1958).

<sup>45</sup> TIFFANY, *DEATH BY WRONGFUL ACT* § 86 (2d ed. 1913). Wisconsin at one time adhered to a minority position denying relief to nonresident aliens. *McMillan v. Spider Lake Saw Mill & Lumber Co.*, 115 Wis. 332, 91 N.W. 979 (1902), but the statute was amended, Wis. Laws 1911, ch. 226, to alter this position.

<sup>46</sup> On the constitutional level, for purposes of the privileges-and-immunities clause, this interpretation is contradicted by *Chambers v. Baltimore & O.R.R.*, 207 U.S. 142 (1907). Cf. *Hughes v. Fetter*, 341 U.S. 609, 611 n.6 (1951); *Broderick v. Rosner*, 294 U.S. 629, 642 n.3 (1935). The interpretation in the text is supported, however, by the well-reasoned dissenting opinion of Mr. Justice Harlan in the *Chambers* case, *supra* at 151, 157-60. Professor Schofield's ridicule of "the highly artificial conception that a dead man may be enough of a live one to receive a legislative grant of the right to bring a lawsuit" is a mere flippancy. Schofield, *The Claim of a Federal Right to Enforce in One State the Death Statute of Another*, 3 ILL. L. REV. 65, 66 (1908). See note 90 *infra*.

<sup>47</sup> This is not to say that the benefits of the statute are to be confined to residents or domiciliaries. The privileges-and-immunities clause and the equal-protection clause will to some extent require equal treatment for nonresidents. See REV. STAT. § 1977 (1875), 42 U.S.C. § 1981 (1952). See also note 27 *supra*.

<sup>48</sup> Wis. Stat. § 331.03 (1947) (now Wis. Stat. § 331.03 (1957)).

der discussion. Doubtless it was included because of territorialist doctrine denying the state legislative jurisdiction over injuries abroad, and not as a voluntary delimitation of the scope of the legislative policy.

From the standpoint of the interests of Illinois the place of injury is equally irrelevant. Illinois' policy is similar to that of Wisconsin, and the benefits of its statute are primarily designed for the families of deceased residents of Illinois. In ordinary cases of personal injury, not resulting in death, the circumstance that the injury occurred within a state provides a legitimate basis for the assertion by that state of an interest in awarding the compensation provided by its laws; otherwise the injured person may become a public charge, and local creditors who have furnished medical and other services and supplies may go unpaid.<sup>49</sup> This basis is not present, however, under a typical wrongful-death statute such as the one in force in Illinois, since the proceeds of the judgment belong to the statutory beneficiaries and are not available to pay claims against the decedent's estate.<sup>50</sup>

*Hughes v. Fetter* was, therefore, a case in which Wisconsin properly had an interest in the application of its compensatory policy, and Illinois had no interest at all.<sup>51</sup> It is Wisconsin that is concerned with the relatives of its deceased citizen. It is Wiscon-

---

<sup>49</sup> *Watson v. Employers Liab. Assur. Corp.*, 348 U.S. 66 (1954).

<sup>50</sup> See *City of Chicago v. Major*, 18 Ill. 349 (1857); *Voorhees v. Chicago & A.R.R.*, 208 Ill. App. 86 (1917); cf. *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145 (1932), discussed in Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 23 (1958).

<sup>51</sup> In attempting to determine the policies which are embodied in the laws of a state and the circumstances which call for the application of those policies I speak very tentatively. I conceive my function to be that of a technician in the conflict of laws, analyzing the interplay of varying state policies on the basis of certain assumptions as to what the policies are and what circumstances should bring them into play. If experts in the law of wrongful death should disagree with these assumptions I should gladly defer to their judgment and modify the analysis of the conflict-of-laws problem accordingly.

Thus, an argument can be made that a wrongful-death statute expresses a policy of penalizing, and hence minimizing, wrongful conduct. The argument is not persuasive to me, and I have elected to proceed on the assumption that the policy is a compensatory one. See Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 27 (1958). If I am wrong in this, Illinois has an interest in applying its law and policy because the negligent conduct occurred there. This still would not alter the fact that Wisconsin also has an interest in compensating the family of its deceased resident, and so would not alter the principal conclusions reached here.

Similarly, I may be wrong in regarding the deceased rather than his dependent

sin that should determine which relatives should share in the compensation. It is Wisconsin, as the domicile of the defendants, that is concerned with the maximum recovery to be allowed.<sup>52</sup> It is Wisconsin that is concerned with the effect of contributory negligence<sup>53</sup> and with the effect upon the right to compensation of the fact that the deceased was a passenger in the defendant's car.<sup>54</sup> Wisconsin, as the home state of all the parties, is an obviously appropriate place for trial, although Illinois, despite its lack of interest in the matter, is not necessarily an inappropriate place, since witnesses to the occurrence may be available there.<sup>55</sup>

In spite of all this, the Wisconsin courts closed their doors to the claim by Mr. Hughes for the death of his son, saying not only that the Wisconsin statute could not avail him but that Wisconsin courts would not entertain an action for a death occurring elsewhere, whether under the law of Wisconsin or the law of the place of injury. Why? No reason having the remotest bearing on any conceivable policy of Wisconsin was suggested. The argument of the state Supreme Court was, in essence: (1) The wrongful-death statute, as we construe it, prohibits the maintenance in our courts of an action for wrongful death unless the death

---

relatives as the object of the state's protective policy. Under the Illinois statute the beneficiaries would be the next of kin, Ill. Rev. Stat. ch. 70, § 2 (1947), as amended, ILL. REV. STAT. ch. 70, § 2 (1957) — i.e., the father (of Wisconsin) and the brother (of Illinois), Ill. Rev. Stat. ch. 3, § 162 (1947) (now ILL. REV. STAT. ch. 3, § 162 (1957)). On the assumption that it is the residence of the beneficiaries that is significant, Illinois would have an interest in applying its law to compensate the brother. Under the Wisconsin statute in force at the time of death the sole beneficiary would have been the father. Wis. Stat. § 331.04 (1947) (now Wis. Stat. § 331.04 (1957)); cf. *Cincoski v. Rogers*, 4 Wis. 2d 423, 90 N.W.2d 784 (1958).

<sup>52</sup> Maximum recovery under the Illinois statute was \$15,000. Ill. Rev. Stat. ch. 70, § 2 (1947), as amended, ILL. REV. STAT. ch. 70, § 2 (1957). Under the Wisconsin statute it was \$12,500, except that a parent could recover an additional \$2,500 on account of loss of society or companionship. Wis. Stat. § 331.04(2) (1947), as amended, Wis. Stat. § 331.04(2) (1957). In addition, § 331.04(1)(b) allowed recovery of funeral expenses on behalf of the estate.

<sup>53</sup> Wisconsin had adopted the rule of comparative negligence. Wis. Stat. § 331.045 (1947) (now Wis. Stat. § 331.045 (1957)).

<sup>54</sup> In Wisconsin the duty of the driver to the guest is that of ordinary care. See *Olson v. Hermansen*, 196 Wis. 614, 220 N.W. 203 (1928). In Illinois the nonpaying guest recovers only for "wilful and wanton misconduct." Ill. Rev. Stat. ch. 95½, § 58(a) (1947) (now ILL. REV. STAT. ch. 95½, § 9-201 (1957)).

<sup>55</sup> Also, Illinois traffic regulations are of course relevant on the issue of negligence. See Record, pp. 15-16; Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 1021 (1958).

was caused here; (2) there is no need to inquire into the purpose or effect of the prohibition, or the policy of the legislature in enacting it; the policy of the state is what the legislature says it is.

The statutory provision which was the subject of this extraordinary feat of construction was a proviso appended to the end of the section creating the cause of action for wrongful death: "provided, that such action shall be brought for a death caused in this state."<sup>56</sup> These words, said the court, "seem plain enough to bar cases not within [the statute's] . . . terms, and to exclude actions where the wrongful act resulting in death occurred in another state."<sup>57</sup> Any other holding would "deprive the proviso of purpose or meaning."<sup>58</sup> To characterize this reasoning as literalism would be to give credit where none is due. While it does share with literalism the vice of indifference to the rationality of the meaning given to the text, it does not share literalism's fidelity to language. Plainly, the language said no more than that the right of action created by the Wisconsin statute was one for local deaths; it said nothing about actions for foreign deaths brought pursuant to foreign statutes. It seems quite clear that the purpose of the proviso was simply to declare that the legislature had no intention of exceeding what were assumed to be the limits of its power.<sup>59</sup> The

---

<sup>56</sup> Wis. Stat. § 331.03 (1947) (now Wis. Stat. § 331.03 (1957)). The proviso was contained in the original enactment (Wis. Laws 1857, ch. 71, § 1, at 85) in more extended form: "Provided, That such action shall be brought for a death caused in this State, and in some court established by the constitution and laws of the same." The second clause was dropped in the compilation of 1898 (Wis. Stat. § 4255 (1898)) with the explanation: "As a denial of the jurisdiction of the federal courts the omitted clause is void. See *Bigelow v. Nickerson*, 70 Fed. Rep. 113, 120; *Railway Co. v. Whiton's Adm'r*, 13 Wall. 270. No good reason is perceived for retaining it and thereby possibly barring an action in the courts of another state." Cf. the Alabama statute involved in the *George* case, Ala. Civ. Code § 6115 (1907).

<sup>57</sup> 257 Wis. at 37, 42 N.W.2d at 453.

<sup>58</sup> *Id.* at 42, 42 N.W.2d at 455.

<sup>59</sup> As was said of the Illinois statute: "It could not have included matters occurring outside the State, because the legislature has no authority over the conduct of individuals outside the State and its acts have no extra-territorial effect." *Crane v. Chicago & W.I.R.R.*, 233 Ill. 259, 265, 84 N.E. 222, 224 (1908) (dissenting opinion). "In many cases arising under similar acts, it has been held that the action could not be maintained if the fatal injury occurred outside of the jurisdiction of the state in which the statute relied on was enacted; that, if it appears that the injury occurred outside of the state, and it did not appear that the law of such state gave such a remedy, there could be no recovery." *Rudiger v. Chicago, St. P., M. & O. Ry.*, 94 Wis. 191, 195, 68 N.W. 661, 662 (1896). "The object and effect of the [original] proviso to our statute was to render the action local, and limit it to cases where death was caused by acts committed or occurring within the state . . ." *Id.* at 195-96, 68 N.W. at 662.



same court had previously held that an action could be maintained in Wisconsin under the Illinois death statute.<sup>60</sup> This it held even though the deceased was a resident of Illinois, and despite the fact that the Illinois death statute expressly prohibited actions in Illinois for deaths occurring outside the state. The court rejected the argument that Wisconsin should retaliate against Illinois, asserting that "the citizens of other states have the same right to sue in the courts of Wisconsin that citizens of Wisconsin have."<sup>61</sup> This precedent was tossed aside in *Hughes* with the comment that the court had not given "due consideration" to the proviso.<sup>62</sup> There was not the slightest suggestion of any reason why the Wisconsin legislature might have wished to exclude actions under foreign statutes for foreign deaths — especially where the deceased was a resident of Wisconsin. It was enough to read the statute as excluding them. "The policy of Wisconsin against the maintenance of such an action having been created positively in a statute, that policy must prevail"<sup>63</sup> — whatever the reason, or lack of reason, supporting the attribution of the policy to the legislature.

The provision of the Illinois statute excluding actions for foreign death was added, in unmistakably clear terms, by amendment in 1903.<sup>64</sup> Thus the Illinois court started with a legislative declaration which the Wisconsin court inferred only by a tortured process of construction. The Illinois court, however, did no better than the Wisconsin court in the matter of elucidating the reasons for the legislative policy. "When the legislature speaks . . . public policy is what the statute indicates."<sup>65</sup> The reasons for such a policy must be sought elsewhere, and with no great prospect that a candid statement of them will be found.

It has been suggested that the Wisconsin policy was merely one

---

<sup>60</sup> *Sheehan v. Lewis*, 218 Wis. 588, 260 N.W. 633 (1935).

<sup>61</sup> *Id.* at 593, 260 N.W. at 635.

<sup>62</sup> 257 Wis. at 41, 42 N.W.2d at 455.

<sup>63</sup> *Id.* at 38, 42 N.W.2d at 453.

<sup>64</sup> Ill. Laws 1903, at 217-18, as amended, ILL. REV. STAT. ch. 70, § 2 (1957): "Provided further, that no action shall be brought or prosecuted in this State, to recover damages for a death occurring outside of this State . . ." It may be significant that the same amendment increased the maximum recovery from \$5,000 to \$10,000.

<sup>65</sup> *Dougherty v. American McKenna Process Co.*, 255 Ill. 369, 372, 99 N.E. 619, 621 (1912). This decision denied recovery, under the New Jersey statute, for the death in New Jersey of a citizen of Illinois.

of retaliation against Illinois.<sup>66</sup> As an interpretation of legislative policy this involves an anachronism, since the exclusionary proviso was contained in the original Wisconsin statute of 1857<sup>67</sup> while the corresponding proviso in the Illinois statute was added by amendment in 1903.<sup>68</sup> The suggestion can mean only that the Wisconsin court's interpretation of the statute in 1949 was motivated by a desire to retaliate. Such an explanation, of course, contributes nothing toward constitutional justification of the decision. Also, if there is any truth in the explanation, the action of the Wisconsin court was singularly irrational. The same court had previously rejected an invitation to retaliate, and had allowed an action in Wisconsin against a Wisconsin resident for the death in Illinois of an Illinois resident.<sup>69</sup> Conceivably, a court might come to regret such magnanimity, and might adopt the opposite principle: Since Illinois does not permit actions for the deaths of Wisconsin residents in Wisconsin, we will not permit actions for the deaths of Illinois residents in Illinois. But *Hughes v. Fetter* will not bear such an interpretation. On the theory of retaliation, the court must be understood as embracing the principle that because Illinois will not entertain an action for the death of an Illinois resident in Wisconsin, Wisconsin will not entertain an action for the death of a Wisconsin resident in Illinois. If that is indeed the principle, Wisconsin has provided what may be history's clearest illustration of cutting off one's nose to spite one's face.

At all events, whether in a spirit of retaliation or not, the Wisconsin court did establish the same exclusionary rule that was established by statute in Illinois. Since it gave no reasons for doing so, the question becomes: Why would any state desire to establish such an exclusionary rule? In attempting to answer this question, and to evaluate some of the answers which have been suggested, we may resort to such evidence as there is concerning the purpose of the Illinois proviso. Until the Wisconsin court aligned itself with the Illinois policy, the Illinois statute was nearly unique.<sup>70</sup>

---

<sup>66</sup> Brief for Appellant, p. 18; 100 U. PA. L. REV. 126, 130 (1951). The appellant also suggested that the "policy" was "a mere assertion of local inertia or indifference . . . ." Brief for Appellant, p. 13.

<sup>67</sup> Wis. Laws 1857, ch. 71, § 1, at 85, as amended, WIS. STAT. § 331.03 (1957).

<sup>68</sup> Ill. Laws 1903, at 217, as amended, ILL. REV. STAT. ch. 70, § 2 (1957).

<sup>69</sup> *Sheehan v. Lewis*, 218 Wis. 588, 260 N.W. 633 (1935).

<sup>70</sup> See TIFFANY, *DEATH BY WRONGFUL ACT* §§ 195-202 (2d ed. 1913). See generally Rose, *Foreign Enforcement of Actions for Wrongful Death*, 33 MICH. L. REV. 545, 572-77 (1935). The only comparable provision was the qualified one in the

There appears to be no record of any statement as to its purpose. It does, however, seem to be related to the hostile attitude which often led courts to refuse to enforce claims for wrongful death on the ground that the foreign cause of action was "penal" or that the forum state did not have a similar statute;<sup>71</sup> and there are certain judicial decisions in Illinois which are relevant to a consideration of arguments advanced in justification of the unstated policy.

Mr. Justice Frankfurter, in dissent, sought to aid the Wisconsin Supreme Court by suggesting some kind of reasonable content for the policy:

The decision of Wisconsin to open its courts to actions for wrongful deaths within the State but close them to actions for deaths outside the State may not satisfy everyone's notion of wise policy. . . . But it is neither novel nor without reason. . . . Wisconsin may be willing to grant a right of action where witnesses will be available in Wisconsin and the courts are acquainted with a detailed local statute and cases construing it. It may not wish to subject residents to suit where out-of-state witnesses will be difficult to bring before the court, and where the court will be faced with the alternative of applying a complex foreign statute—perhaps inconsistent with that of Wisconsin on important issues—or fitting the statute to the Wisconsin pattern.<sup>72</sup>

Insofar as this suggests that the policy rests upon a disinclination to apply unfamiliar foreign law it assumes that the foreign law will or must be applied, and so ignores the majority's tenth footnote, disclaiming any holding to that effect. Moreover, as Professor Reese has justly observed, if unwillingness to apply foreign law is an adequate excuse for refusing to do so, the requirement of full faith and credit to public acts is rendered meaningless.<sup>73</sup> Both objections—unfamiliarity with foreign law and difficulty of access to witnesses—would apply with equal force to actions for personal injuries sustained outside the state; yet such actions are regularly entertained by both Wisconsin and Illinois.<sup>74</sup> Shortly

---

Ohio statute involved in *Chambers v. Baltimore & O.R.R.*, 207 U.S. 142 (1907). See note 90 *infra*.

<sup>71</sup> See *TIFFANY, op. cit. supra* note 70, §§ 197, 198, 198-1; *Rose, supra* note 70, at 559-65.

<sup>72</sup> 341 U.S. at 618-19.

<sup>73</sup> *Reese, supra* note 22, at 346.

<sup>74</sup> The statement in *Rose, supra* note 70, at 576, that the Illinois exclusionary policy extends to actions for personal injuries is erroneous.

before the 1903 amendment, the Illinois court was urged on similar grounds to refuse to hear an action for the death in Indiana of a resident of Illinois. Although the Indiana law differed from that of Illinois in that it abrogated the fellow-servant rule, the court affirmed a judgment for the plaintiff, saying: "Every day our courts are enforcing rights under foreign contracts where the *lex loci contractus* and the *lex fori* are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the law of the State where made."<sup>75</sup>

In addition, there are the following solid indications that the policy of Illinois, at least, was not one of avoiding the trial of cases in which it would be necessary to apply foreign law or in which it would be difficult to obtain the testimony of witnesses to the occurrence:

(1) The proviso was held to preclude action in Illinois under the Federal Employers' Liability Act for death in another state.<sup>76</sup> Of course, the law applicable in such an action is the same federal law which would apply in a case of death in Illinois.

(2) The proviso was held to preclude action in Illinois on a judgment for wrongful death obtained in the state of injury.<sup>77</sup> Of course, in such an action there could be no problem of interpreting the foreign statute or of procuring the attendance of witnesses.

(3) In construing the peculiar language of the proviso ("[N]o action shall be brought . . . in this State to recover damages for a *death occurring* outside of this State . . ."),<sup>78</sup> the courts held that an action could be maintained where a resident of Illinois was injured in Indiana and later died in a hospital in Illinois.<sup>79</sup>

---

<sup>75</sup> *Chicago & E.I.R.R. v. Rouse*, 178 Ill. 132, 137, 52 N.E. 951, 952 (1899) (quoting with approval from an early Minnesota decision).

<sup>76</sup> *Walton v. Pryor*, 276 Ill. 563, 115 N.E. 2, writ of error dismissed on motion of plaintiff in error, 245 U.S. 675 (1917). After the 7-to-2 decision in *First Nat'l Bank v. United Air Lines, Inc.*, 342 U.S. 396 (1952), the Supreme Court of Illinois held that it was unconstitutional to refuse to take jurisdiction of a wrongful-death action arising under the FELA where the death occurred outside the state. *Alender v. Elgin, J. & E. Ry.*, 8 Ill. 2d 164, 133 N.E.2d 288, cert. denied, 352 U.S. 833 (1956).

<sup>77</sup> *Kenny v. Supreme Lodge, Loyal Order of Moose*, 285 Ill. 188, 120 N.E. 631 (1918), rev'd, 252 U.S. 411 (1920).

<sup>78</sup> Ill. Laws 1903, at 217, as amended, ILL. REV. STAT. ch. 70, § 2 (1957). (Emphasis added.)

<sup>79</sup> *Fitzgerald v. Cleveland, C.C. & St. L. Ry.*, 151 Ill. App. 32 (1909).

Thus Illinois allowed the action to be maintained although both of the difficulties suggested by Mr. Justice Frankfurter were present: The action was predicated on a foreign statute and witnesses to the occurrence were, by hypothesis, more readily available in Indiana than in Illinois.

The two difficulties mentioned by Mr. Justice Frankfurter are among the factors commonly considered by courts in applying the doctrine of *forum non conveniens*.<sup>80</sup> In an appropriate case these, along with other factors, may justify a state's refusal to entertain a cause of action having foreign aspects. Where, however, all parties are residents of the forum state, the mere fact that it may be necessary to inquire into foreign law, or that it may be impossible to compel the attendance of occurrence witnesses, is hardly enough to justify dismissal on *forum non conveniens* grounds.

Various other attempts have been made to elucidate the policy embodied in the restrictive provisos. Thus, according to one commentator:

The Wisconsin death statute of 1857 was one of the first, and in those days, because of the strangeness of the new action and the uncertainty of the law concerning the enforcement of foreign statutory rights, courts were most reluctant to entertain suits on deaths occurring outside of their jurisdiction. . . . The real basis of the restrictive proviso in the original Wisconsin statute was probably the fear and doubt of the courts in enforcing these new rights.<sup>81</sup>

We have already observed that the "real basis" of the proviso in the original Wisconsin statute was probably to delimit the application of the statute, and not to exclude actions for death outside the state. Passing that point, we may concede that there was indeed considerable hostility toward the enforcement of claims predicated on deaths outside the forum state, evidenced by the tendency to deny enforcement on the ground that the action was penal, or that there was no similar local statute, or that maintenance of the action would be contrary to local policy. To say,

---

Compare *Rudiger v. Chicago, St. P., M. & O. Ry.*, 94 Wis. 191, 68 N.W. 661 (1896) (interpretation of Wisconsin proviso, "[F]or a death caused in this state . . .").

<sup>80</sup> See, e.g., *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947).

<sup>81</sup> 100 U. PA. L. REV. 126, 129 (1951).

however, that this hostility was motivated by "fear and doubt" does little to explain what the motivation actually was; at the very least, fear and doubt arising from the novelty of the statutory remedy could hardly justify the decision of the Wisconsin court in 1949. In somewhat similar vein we are told that while there was an initial desire to facilitate recovery by opening the courts to foreign suits, "abuse" by plaintiffs of this liberal policy led to its reconsideration.<sup>82</sup> Just how this abuse manifested itself is not disclosed. There is little indication that the nationwide forum-shopping with which we are familiar in modern times was practiced on an alarming scale in 1903<sup>83</sup> — to say nothing of 1857. If there was a similar problem, it probably extended then, as now, to personal injury as well as wrongful-death actions, and could have been handled on the principle of *forum non conveniens*. No reason yet appears why the solution should have been confined to wrongful-death cases, and to the drastic device of denying all remedy where the injury or death occurred outside the state, regardless of other considerations.

If I may be permitted a speculation of my own as to the "real" purpose of the restrictive proviso in the Illinois statute, I suggest that the purpose was to achieve by indirection and approximation an objective which — it was thought — could not be achieved directly. There was, indeed, doubt and fear about the new remedy which had been engrafted on the common law. It was no doubt with hesitation that the states conferred the new right even on local residents at the expense of other local residents. It was decidedly unsettling to contemplate the enforcement of such a right at the suit of a nonresident against a resident — particularly since the nonresident might sue under a foreign statute drawn with less solicitude for the defendant than was the local statute. It is to be remembered that at the time in question legislation authorizing substituted service upon a nonresident who had caused injury or death in a state was nonexistent and almost

---

<sup>82</sup> Rose, *supra* note 70, at 552. Another suggested explanation, which seems highly unlikely, is that the legislature passing an exclusionary statute such as that of Illinois "acted unwittingly and inadvertently, evidently not seeing or intending the necessary practical operation and effect of the statutes to deny private rights secured and protected by the Constitution and laws of the United States." Schofield, Comment, 13 ILL. L. REV. 43, 52 (1918).

<sup>83</sup> But see *Baltimore & O.R.R. v. Chambers*, 73 Ohio St. 16, 30, 76 N.E. 91, 95 (1905), *aff'd*, 207 U.S. 142 (1907).

unthinkable.<sup>84</sup> I suggest that the Illinois legislature reasoned as follows: Actions brought in Illinois for deaths occurring elsewhere are likely to be actions for the deaths of nonresidents, brought against Illinois residents or business enterprises. The person killed outside the state is more likely to be a nonresident than a resident of Illinois; the action is likely to be brought here because this, as his home, is the only state in which process can be served on the defendant. While these assumptions are not strictly accurate, the exceptions will be relatively rare. By precluding actions here for deaths elsewhere we can approximate the objective of denying recovery to a nonresident killed by a resident of this state. The rare cases in which an Illinois resident is killed elsewhere by a tortfeasor suable here can be written off for the sake of the larger gain. If a nonresident is killed in this state by a local resident there will be a recovery, which may seem to discriminate against our resident killed abroad, but at least the local defendant will have the protection of our own statute.

This is a technique well established in the conflict of laws.<sup>85</sup> Support for the view that this is what the Illinois legislature was up to in 1903 may be found in the unfolding of a similar legislative development in Ohio. At one time it was assumed that no ac-

---

<sup>84</sup> "At the time the first edition of the Restatement was written, the reporter and his advisers felt that they were taking a very advanced step when they incorporated into the draft provisions for jurisdiction over the absent itinerant motorist who had an accident in the state." Goodrich, *Foreword to RESTATEMENT (SECOND), CONFLICT OF LAWS* at v (Tent. Draft No. 3, 1956).

<sup>85</sup> In two well-known cases on the statute of frauds the Delaware court and the Massachusetts court declared that the policy of the statute was to protect local citizens and then set about candidly to determine the choice-of-law rule which would afford the maximum degree of protection to those beneficiaries. The Delaware court, apparently reasoning that most contracts made by Delawareans would be made in Delaware, elected to hold the statute "substantive,"—i.e., applicable to contracts made in Delaware. *Lams v. H. F. Smith Co.*, 36 Del. 477, 178 Atl. 651 (1935). The court's confidence in the general tendency of the rule was apparently not shaken by the fact that in the case at bar the result was to deprive a Delaware corporation of the protection of the local statute. The Massachusetts court, dealing with the narrower problem of contracts to make a will, estimated the probabilities differently: Actions on such contracts were likely to be brought at the domicile; therefore maximum protection for Massachusetts citizens could be attained by holding the statute "procedural" so that it applied to all actions in Massachusetts irrespective of where the contract was made. Mr. Justice Holmes, speaking for the court, went further, and served notice that if in operation the rule did not produce results consistent with the protective policy, the rule could be modified as the occasion might arise. *Emery v. Burbank*, 163 Mass. 326, 39 N.E. 1026 (1895).

tion could be brought in Ohio for a wrongful death occurring outside the state.<sup>86</sup> Then, in 1894, the legislature adopted a policy of reciprocity: Ohio would enforce causes of action under a foreign statute if the state of injury would similarly enforce rights asserted under the Ohio statute.<sup>87</sup> This policy was abandoned in 1902, the statute being amended to provide generally for the enforcement of causes of action for wrongful death under foreign law — *provided* the deceased was “a citizen of this state.”<sup>88</sup> Thus Ohio boldly stated its selfish and discriminatory policy: The burdens imposed on local defendants by the wrongful-death act were solely for the benefit of local citizens and such sojourners as might happen to be injured in the state. Persons injured elsewhere, even by Ohio citizens or enterprises, were to have no re-

---

<sup>86</sup> See *Chambers v. Baltimore & O.R.R.*, 207 U.S. 142, 149 (1907); *Baltimore & O.R.R. v. Chambers*, 73 Ohio St. 16, 25, 76 N.E. 91, 93 (1905); *Wabash R.R. v. Fox*, 64 Ohio St. 133, 141, 59 N.E. 888, 889 (1901). Contrary to statements in these cases, the proposition seems to have rested on assumption rather than “established law.” *Woodard v. Michigan S. & N.I.R.R.*, 10 Ohio St. 121, 124 (1859), held only that an Ohio administrator could not sue under the Illinois statute, and expressly left open the question whether an Illinois administrator might do so. Two other cases held only that the Ohio statute did not apply to injuries sustained elsewhere. *Hover v. Pennsylvania Co.*, 25 Ohio St. 667 (1874) (memorandum opinion); *Brooks v. Railway Co.*, 53 Ohio St. 655, 44 N.E. 1131 (1895) (memorandum opinion).

<sup>87</sup> 91 Ohio Laws 408 (1894). It should be noted that a reciprocity statute is quite consistent with the kind of thinking which has been attributed to the Illinois legislature. Assuming that the general objective is to reserve for local residents the benefits of the liability imposed on local tortfeasors, the first concession that is likely to be made is one on the basis of reciprocity — especially if the safeguards of the local statute are secured to the local defendant; and the Ohio legislature carefully stipulated that the recovery allowed under the statute of the reciprocating state must not exceed the maximum provided by the Ohio statute.

<sup>88</sup> 95 Ohio Laws 401 (1902). As has been observed, such exclusionary statutes are related to judicial devices such as denial of recovery because the foreign death statute is dissimilar, or penal, or contrary to the public policy of the forum. While we cannot pursue those judicial devices in detail here, it is instructive to compare the relevant development in New York as reflected in the well-known case of *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 120 N.E. 198 (1918). Without intending to detract anything from the altruism and liberality of Judge Cardozo’s eloquent opinion, one may point out that the deceased, who was killed in Massachusetts, was a resident of New York, and his surviving widow and children also resided there. *Id.* at 102, 111, 120 N.E. at 198, 202. Faced with the problem of what to do with actions against local defendants under foreign statutes, New York did not react as Ohio, Illinois, and Wisconsin did; it refrained from discriminating against nonresidents, and from discriminating against its own residents to that end. Even so, the court, strongly influenced by the *obligatio* theory, failed to give the family the measure of protection which New York policy required. *Id.* at 112, 120 N.E. at 202.



dress in Ohio, either under Ohio law or under the law of the state of injury — unless they were citizens of Ohio.

It is not unlikely that this amendment of the Ohio statute, passed May 6, 1902, came to the attention of Senator Corbus P. Gardner, of La Salle County, Illinois, who on March 24, 1903 introduced Senate Bill 431, which resulted in the amendment of the Illinois statute to exclude actions for wrongful deaths occurring in other states.<sup>89</sup> Ohio was doing just what any selfish state would like to do: reserving the benefits of the wrongful-death statute for local people primarily, and protecting local enterprises against claims based on the deaths of foreigners. But was not Ohio, perhaps, going too far? Its crass, outright discrimination between citizens of Ohio and citizens of other states obviously jeopardized the whole scheme, because of the risk that it would be found violative of the privileges-and-immunities clause. Senator Gardner, a lawyer, was not prepared to go so far. He proposed simply to close the courts of Illinois to actions based on injuries occurring elsewhere, thus achieving the desired result. This would mean that an occasional citizen of Illinois who might be killed elsewhere by a fellow citizen would be deprived of the protection of Illinois law; but Senator Gardner and the Illinois legislature were content to take the bitter with the sweet. The risk that the entire scheme would be invalidated on constitutional grounds if its purpose were achieved too completely or too explicitly dictated such a degree of impartiality.<sup>90</sup>

---

<sup>89</sup> Ill. Laws 1903, at 217-18.

<sup>90</sup> In fact, of course, thanks to an extraordinarily inept decision of the Supreme Court, Ohio got away with its extreme discrimination. *Chambers v. Baltimore & O.R.R.*, 207 U.S. 142 (1907). Essentially, the Court reached its surprising result by focusing upon the beneficiary, or the plaintiff — it is not clear which — as the object of the Constitution's protection, so that discrimination based upon citizenship of the deceased became immaterial. This was a corollary of the emphasis upon the right of access to courts as the privilege or immunity in question, as distinguished from the substantial protection afforded to the potential victim by the wrongful-death statute. The triviality of this distinction is emphasized by the fact that the protection of the Constitution was made to depend upon whether the statute provided for survival of a right of action originally vested in the deceased, or created a "new" cause of action. 207 U.S. at 151.

In *Hughes v. Fetter*, the *Chambers* case was distinguished on the ground that there the full-faith-and-credit clause was not invoked. 341 U.S. at 611 n.6. This circumstance may give rise to an inference that, in a repetition of the *Chambers* situation today, the Court would hold that Ohio is required by the full-faith-and-credit clause to entertain the action. But the *Chambers* case did not involve that discrimination against local residents which, according to the analysis in this

This, it may be conceded, is a rather speculative interpretation of the policy underlying the decision of the Wisconsin court in *Hughes v. Fetter*. If it is accepted, the interpretation means that in an effort to accomplish by indirection and approximation a discrimination against nonresidents, Wisconsin imposed an arbitrary and capricious discrimination against certain of its own residents — namely, those whose deaths resulted from injuries inflicted outside the state. But it is not necessary to accept this interpretation in order to reach the conclusion which is suggested here. The important result of this rather wide-ranging effort to find an explanation for the strange behavior of the Wisconsin court is that no rational and constitutionally defensible explanation can be found. The inescapable fact is that Wisconsin, in its wrongful-death statute, established a policy for the protection of Wisconsin residents generally, and then excluded from the protection of that policy a certain class of residents: those whose deaths resulted from injuries received elsewhere. Since no constitutionally tenable policy of the state relating either to the administration of its courts or to any of its other governmental concerns can be suggested which can justify this classification, the classification is arbitrary and capricious.<sup>91</sup> The vice, therefore, of the state action in *Hughes v. Fetter* was that it denied to members of the disfavored class the equal protection of the laws.<sup>92</sup>

---

paper, supplied the constitutional basis for the holding that Wisconsin must entertain the action in *Hughes*. It seems much more likely that the Court, following Mr. Justice Harlan's dissent in *Chambers*, would hold that Ohio's discrimination against citizens of other states violated the privileges-and-immunities clause (a result which would entail no implication that Ohio is required to apply the law of the state of the injury). Even this result seems unlikely, however, on the precise facts of *Chambers*, since the defendant was a Maryland corporation and the facts strongly suggest a situation in which the doctrine of forum non conveniens may be appropriately invoked.

<sup>91</sup> Choice of law is beyond the scope of this paper. Yet it is pertinent to suggest that if it is true that (1) Wisconsin has an interest in the application of its wrongful-death statute in the circumstances of *Hughes v. Fetter*, and that (2) Illinois has no interest in the application of its statute, and that (3) the distinction drawn by Wisconsin between residents killed at home and residents killed elsewhere is arbitrary and capricious, then it should follow that Wisconsin is required by the Constitution not only to entertain the action but to apply Wisconsin law. The application of Illinois law instead would be a denial of due process. See Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958); Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 239 (1958).

<sup>92</sup> See U.S. CONST. amend. XIV, § 1. Professor Henry Schofield, who in 1918

The reliance of the Supreme Court on the full-faith-and-credit clause was both unnecessary and confusing.

This view of the matter finds interesting support in an early case concerning the restrictive proviso in the Illinois statute. The language of the proviso, it will be recalled, barred suits "to recover damages for a *death occurring* outside of this State."<sup>93</sup> Less than a year after the proviso was enacted, a train collided in Cook County with a milk wagon occupied by one Frederick Frank and his two sons, all residents of Illinois. Frederick Frank died the following morning; one of the boys was not seriously injured; the other was removed a few miles from the scene of the accident to a hospital in Indiana, where he died. In the action for the death of the child, the railroad obtained a directed verdict because death occurred outside Illinois. The Illinois Supreme Court reversed, construing the statute as giving a cause of action where the "wrongful act, neglect or default" occurs within the state.<sup>94</sup> Justices Dunn and Carter concurred in the result but took sharp issue with this construction of "plain and unambiguous" language.<sup>95</sup> The proviso meant exactly what it said: An action may not be brought in Illinois to recover damages for a death occurring outside the state. But the proviso was *unconstitutional* as establishing an arbitrary discrimination and hence denying the equal protection of the laws.<sup>96</sup> "The place where death occurs is a mere incident."<sup>97</sup> From the standpoint of the state's concern for the welfare of its own people, and of its obligation to administer its protective policies impartially, the place of injury — or of the "wrongful act, neglect or default" — is equally a mere incident, at least so far as the right of access to local courts is concerned.<sup>98</sup>

---

took the position that the Illinois and Wisconsin exclusionary policies were in violation of the full-faith-and-credit clause, also suggested the possible applicability of the equal-protection clause. Schofield, Comment, 13 ILL. L. REV. 43, 52 n.10 (1918).

<sup>93</sup> Ill. Laws 1903, at 217, 218. (Emphasis added.)

<sup>94</sup> Crane v. Chicago & W. Ind. R.R., 233 Ill. 259, 262, 84 N.E. 222, 223 (1908).

<sup>95</sup> *Id.* at 265, 84 N.E. at 225.

<sup>96</sup> *Id.* at 264, 84 N.E. at 224.

<sup>97</sup> *Ibid.*

<sup>98</sup> In support of their position, the concurring justices cited *In re Day*, 181 Ill. 73, 54 N.E. 646 (1899), and *Sanitary Dist. v. Bernstein*, 175 Ill. 215, 218, 51 N.E. 720, 721 (1898). Cf. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 384 (1959): "The amount and type of recovery which a foreign seaman may receive from his foreign employer while sailing on a foreign ship should not depend on the wholly fortuitous circumstance of the place of injury."

On the level of the federal Constitution, it can hardly be doubted that the right

To deny the right of access to local courts merely because the injury occurred across the state line, when the deceased and the tortfeasor are both residents of the state, is to withhold a remedy for an arbitrary and capricious reason, having no relation to any defensible state policy, and is therefore a denial of the equal protection of the laws.

This view of the matter has the advantage of reconciling the holding in *Hughes v. Fetter*, that Wisconsin must entertain the action, with the reservation in the Court's tenth footnote of the right of Wisconsin to apply its own law. So long as the obligation to provide a forum is rested on the full-faith-and-credit clause, the results reached by the opinion and the footnote are irreconcilable. When the obligation to provide a forum is rested on the equal-protection clause, however, the conflict disappears entirely. The view that the opinion and the footnote are compatible, and that the vice of the Wisconsin action consisted in its discriminatory character, is supported by the subsequent decision in *Wells v. Simonds Abrasive Co.*<sup>99</sup> The Court held that the district court in

---

of access to courts is one which is safeguarded by the equal-protection clause. See 16 Stat. 144 (1870), 42 U.S.C. § 1981 (1952); *Kentucky Fin. Corp. v. Paramount Auto Exch. Corp.*, 262 U.S. 544 (1923); *cf.* *Chambers v. Baltimore & O.R.R.*, 207 U.S. 142, 148 (1907) (privileges-and-immunities clause). The question of who, in the context of a wrongful-death action, is entitled to the protection, is somewhat beclouded by the unfortunate decision in the *Chambers* case. See note 90 *supra*. It seems both reasonable and convenient to assume that the person protected is the decedent. See pp. 46-47 *supra*. But so far as *Hughes v. Fetter* is concerned, the difficulty is unimportant since the deceased, the beneficiary, and the administrator were all residents of Wisconsin. Even if it be assumed that the person protected is the deceased, it may be objected that a Wisconsin resident injured outside Wisconsin is not a person "within its jurisdiction," U.S. CONST. amend. XIV, § 1, but this seems a mere quibble. The constitutional phrase certainly does not mean "physically present within its territorial limits," and probably means all persons within the scope of the state's laws. See *Kentucky Fin. Corp. v. Paramount Auto Exch. Corp.*, *supra*. See also *Allied Stores v. Bowers*, 358 U.S. 522 (1959); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949). Whatever may be the status of the right to sue in Wisconsin for the out-of-state death of a nonresident, see note 90 *supra*, the right to sue in Wisconsin for the out-of-state death of a Wisconsin resident should be secure.

<sup>99</sup> 345 U.S. 514 (1953). Pennsylvania had no rule excluding actions for wrongful death occurring elsewhere, so that the question of the obligation to provide a forum did not arise. Since the deceased was a resident of Alabama, *id.* at 519, the argument in the text, that equal protection required Wisconsin to provide a forum in *Hughes v. Fetter*, is inapplicable. If Pennsylvania had an obligation to entertain the action in *Wells*, it must rest on some other constitutional principle. See note 90 *supra*.

Pennsylvania was under no obligation to respect the provision of the statute of the state of injury concerning the time within which suit might be brought,<sup>100</sup> but was perfectly free to apply Pennsylvania's statute of limitations. In so doing the Court reaffirmed the principle of the footnote in *Hughes v. Fetter*, and so gave support to the view that the obligation of Wisconsin to provide a forum in that case did not arise from the full-faith-and-credit clause. The "crucial factor" in that decision was "that the forum *laid an uneven hand* on causes of action arising within and without the forum state. Causes of action arising in sister states were *discriminated against*."<sup>101</sup> One does not discriminate against causes of action, but against people. Wisconsin's discrimination in *Hughes v. Fetter* was against its own residents, and denied them equal protection. Despite the holding in *Chambers v. Baltimore & O.R.R.*,<sup>102</sup> similar discrimination against citizens of another state may be a denial of the privileges and immunities of state citizenship. But the full-faith-and-credit clause says nothing about discrimination; and where the forum is free to apply its own rather than the foreign law it is difficult to see what the full-faith-and-credit clause has to do with the constitutional obligation to provide a forum.<sup>103</sup>

Shortly after Wisconsin's discriminatory policy of excluding actions for out-of-state deaths was invalidated, the similar policy adopted by Illinois met the same fate.<sup>104</sup> Essentially the case

---

<sup>100</sup> Cf. *Cox v. Roth*, 348 U.S. 207, 210 (1955); *Engel v. Davenport*, 271 U.S. 33, 38 (1926).

<sup>101</sup> 345 U.S. at 518-19. (Emphasis added.)

<sup>102</sup> 207 U.S. 142 (1907). See note 90 *supra*.

<sup>103</sup> The dissenting opinion of Mr. Justice Jackson in *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 519 (1953) is flatly inconsistent with the footnote in *Hughes v. Fetter*. It proceeds on two grounds: (1) Despite the rule of *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), the *Erie* doctrine does not require a federal district court to apply state choice-of-law rules in tort cases; and (2) under the full-faith-and-credit clause the forum is required to apply the substantive law of the state of injury, the statute of limitations in this case being regarded as substantive. "I had supposed, before *Hughes v. Fetter*, 341 U.S. 609, that the Commonwealth of Pennsylvania could close its doors to trial of this case. But no one would have questioned, I should think, that if the cause were entertained it must be tried in accordance with the law of the place of the wrong." 345 U.S. at 522-23. The sharp conflict between this territorialist position and the policy-oriented footnote serves to emphasize the footnote's significance. Yet it is disconcerting to note that Mr. Justice Black, who wrote the footnote in *Hughes v. Fetter*, concurred in this dissent.

<sup>104</sup> *First Nat'l Bank v. United Air Lines, Inc.*, 342 U.S. 396 (1952).

presented the same problem as *Hughes v. Fetter*, and the Court so held. The deceased was a resident and citizen of Illinois; the plaintiff executor was an Illinois bank; the defendant was a Delaware corporation having its principal place of business in Illinois.<sup>105</sup> Thus the argument which has been made with respect to *Hughes v. Fetter* is applicable here: In refusing a forum because of the fortuitous circumstance that death occurred outside the state, Illinois discriminated arbitrarily against some of its own residents. Only two circumstances differentiating the Illinois case require mention: (1) The action was brought in a United States district court in Illinois rather than in a state court. The holding that the proviso, if valid as applied to the state courts, would deprive the federal courts of jurisdiction is of importance in the present context only because it brings to mind an additional reason why the *Chambers* case should be overruled if it is not already thoroughly discredited.<sup>106</sup> (2) In 1935 the exclusionary proviso in the Illinois statute had been amended to provide that actions for out-of-state death were barred only where "a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place."<sup>107</sup> On our assumption that the main purpose of the proviso of 1903 was to discriminate against nonresidents, this was a substantial amelioration of the discriminatory policy. A nonresident injured outside Illinois could now sue an Illinois tortfeasor not amenable to process elsewhere. Because of this, it was not unreasonable for the defendant to entertain the hope that *Hughes v. Fetter* was distinguishable. As amended, the proviso appeared to express simply a policy of not burdening the Illinois courts with such litigation except when the interests of justice should require that Illinois provide a forum—a policy generally similar to that expressed in the doctrine of *forum non conveniens*. Indeed, the court of appeals distinguished *Hughes*

---

<sup>105</sup> *Id.* at 396-97; Record, p. 45; Petition for Certiorari, p. 18.

<sup>106</sup> See note 90 *supra*. The Ohio Supreme Court had justified its condonation of the Ohio exclusionary statute on the ground that, in cases of diversity of citizenship, actions for out-of-state deaths of noncitizens of Ohio might be brought in the federal courts. *Baltimore & O.R.R. v. Chambers*, 73 Ohio St. 16, 29, 76 N.E. 91, 95 (1905). Whatever weight might have been attached to this mitigating circumstance at the time, the alternative of a federal forum in the state is no longer available. *E.g.*, *Angel v. Bullington*, 330 U.S. 183, 191-92 (1947).

<sup>107</sup> Ill. Laws 1935, at 916 (now ILL. REV. STAT. ch. 70, § 2 (1957)).

*v. Fetter* on just such grounds.<sup>108</sup> In *First Nat'l Bank v. United Air Lines, Inc.*<sup>109</sup> the Supreme Court reversed, saying only that the command of the full-faith-and-credit clause was as strong in the one case as in the other. This can hardly be taken to mean that the doctrine of forum non conveniens, established for the federal courts in *Gulf Oil Corp. v. Gilbert*,<sup>110</sup> is repudiated. Probably the meaning is that the relationship of the parties to Illinois was such that the case was not an appropriate one for application of that doctrine. The analysis suggested in this paper enables one to make much the same point in a more forceful way: While the 1935 amendment to the exclusionary proviso mitigated the discrimination against nonresidents, it did nothing to remove the arbitrary discrimination which deprived one class of Illinois residents of the protection of the Illinois wrongful-death statute, including their personal representatives' right of access to the courts of their home state.<sup>111</sup> It is ironical that Illinois, having abandoned the policy of discrimination against nonresidents which was the original purpose of the proviso, retained the discrimination against its own residents which was only a distasteful incident of that policy.<sup>112</sup>

---

<sup>108</sup> *First Nat'l Bank v. United Air Lines, Inc.*, 190 F.2d 493, 494-95 (7th Cir. 1951).

<sup>109</sup> 342 U.S. 396, 398 (1952).

<sup>110</sup> 330 U.S. 501 (1947); *cf.* *Hughes v. Fetter*, 341 U.S. 609, 612-13 (1951). See also 28 U.S.C. § 1404(a) (1952).

<sup>111</sup> If residents of Illinois generally are accorded the right of access to Illinois courts, it is not sufficient to say to an arbitrarily selected class of residents that they must be content with a remedy in a foreign court. "Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal right must be maintained." *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 350 (1938).

<sup>112</sup> I do not suggest that the 1935 amendment removed any ground of objection to the proviso under the privileges-and-immunities clause. See note 90 *supra*. The right of access to the courts of Illinois for purposes of recovering damages for wrongful death may depend upon (1) the relationship of the deceased to the state; (2) the relationship of the defendant to the state; and (3) the appropriately applicable law. In *Hughes v. Fetter* and *United Air Lines* there is strong ground for the position that the plaintiff is entitled not only to an Illinois forum but to Illinois law as well. See note 91 *supra*. Since this would not be true in an action for the out-of-state death of a nonresident, the case for an Illinois forum for such an action is less strong. However, where the defendant is domiciled in Illinois the privileges-and-immunities clause may require Illinois to provide a forum irrespective of the law to be applied. Full consideration of these possibilities is beyond the scope of this article. The point in the text is simply that the 1935

If this analysis is sound, it follows that the exclusionary policies expressed by the Wisconsin court and the Illinois legislature are unconstitutional as applied to injuries suffered by local residents in foreign countries as well as to injuries suffered in sister states. The discrimination and the denial of equal protection of the laws is the same in either case.<sup>113</sup>

### III. LOCALIZING THE "TRANSITORY" ACTION

It is not easy to find a satisfactory definition of a transitory action.<sup>114</sup> It is necessary to begin by noting that, because of the

---

amendment to the proviso removed, as a practical matter, the harshest features of the discrimination against nonresidents.

<sup>113</sup> In *Allendorf v. Elgin, J. & E. Ry.*, 8 Ill. 2d 164, 168, 133 N.E.2d 288, 290 (1956), the court held that after the *United Air Lines* case Illinois could not refuse to entertain actions under the Federal Employers' Liability Act for out-of-state deaths, and assumed that the restrictive proviso remained operative only with respect to actions under the laws of foreign countries. The decedent was a resident of Indiana and the action was against a corporation of Illinois and Indiana.

The supremely ironical touch has been added by *James v. Grand Trunk W. R.R.*, 14 Ill. 2d 356, 152 N.E.2d 858, *cert. denied*, 358 U.S. 915 (1958). An action by a Michigan administratrix for the death in Michigan of a Michigan resident was brought in Illinois under the Michigan wrongful-death statute, the defendant being incorporated in Michigan and Indiana. The defendant obtained from a Michigan court an injunction against prosecution of the Illinois action. After half a century of operating under the statutory policy of excluding such actions, the Illinois court not only refused to treat the Michigan injunction as conclusive but, in order to "protect its jurisdiction" of the case, *id.* at 368, 152 N.E.2d at 865, authorized a counterinjunction against the defendant restraining it from enforcing the Michigan court's decree. The court conceded that the action might be subject to dismissal on the principle of *forum non conveniens*, but observed that the defendant had not invoked that principle. In this 180-degree reversal of the exclusionary policy which the Supreme Court had held violative of the requirement of full faith and credit to public acts, Illinois denied full faith and credit to the records and judicial proceedings of a sister state. See Comment, *Full Faith and Credit to Foreign Injunctions*, 26 U. CHI. L. REV. 633 (1959), which argues that, despite authorities to the contrary, there is no warrant for excepting such judgments from the command of the full-faith-and-credit clause.

<sup>114</sup> The entry in *BOUVIER, LAW DICTIONARY* 1185 (Baldwin Century ed. 1946), copied by most of his imitators ("an action the cause of which might have arisen in one place or county as well as another"), is not a definition at all, but a statement of the test employed by Marshall, C.J., among others, to distinguish transitory from local actions. *Livingston v. Jefferson*, 15 Fed. Cas. 660, 664 (No. 8411) (C.C.D. Va. 1811).

The best definition is from a source which may not be regarded as primary authority:



history and forms of the common law, there are certain actions which are safely brought only in a particular locality. These are called local actions, and all others are transitory. It does not follow, of course, that a transitory action is one that may be brought anywhere. In Anglo-American jurisprudence, at least, there are several concepts which limit the localities in which an action may be brought: The court selected must have jurisdiction of the person of the defendant or of some thing with respect to which a claim is asserted; there must be compliance with statutory venue provisions; and, even if these requirements are met, the court in which the action is filed may decline to adjudicate the case, invoking the doctrine of *forum non conveniens*<sup>115</sup> or one of a number of other doctrines<sup>116</sup> which have no relation to the historical bases of the distinction between local and transitory actions.

Under the early common law, all actions were local, being triable only where it was possible to summon a jury having knowledge of the facts.<sup>117</sup> Transitory actions are, therefore, those which have somehow been freed from the localizing effect of the common law's institutions, traditions, and forms. The remainder are local not because of inherent characteristics which make them so in the nature of things, but simply because they have not been so liberated. Lord Mansfield found a substantial as well as a formal reason for treating certain actions as local: In some actions, such as ejectment, the judgment could not be

---

There be actions local which must be tried,  
*Within the ward of Cheap to wit,*  
 Where their proper cause doth of right abide,  
*And St. Mary-le-Bow to prosper it.*  
 But trespass of transitory kind,  
*Within the ward of Cheap to wit,*  
 Shall be laid where the plaintiff hath a mind,  
*And St. Mary-le-Bow to prosper it.*

POLLOCK, *LEADING CASES DONE INTO ENGLISH* 22, 24 (2d ed. 1892).

<sup>115</sup> See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). See generally Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929).

<sup>116</sup> For example, that the action is to recover a tax, or a penalty, or is contrary to the public policy of the forum. See generally RESTATEMENT, CONFLICT OF LAWS §§ 608-617 (1934).

<sup>117</sup> *Livingston v. Jefferson*, 15 Fed. Cas. 660, 663 (No. 8411) (C.C.D. Va. 1811). Sack, *Conflicts of Laws in the History of the English Law*, 3 LAW: A CENTURY OF PROGRESS 342, 345-49 (1937); 5 HOLDSWORTH, *HISTORY OF ENGLISH LAW* 117-20, 140-42 (2d ed. 1937).

effectual if the action were not brought in a county in which the officers of the court could execute it.<sup>118</sup> But even ejectment, the most clearly local of all local actions, is not so in the nature of things; given a change in the form of the judgment, or the authority of court officials, and in attitudes concerning what is convenient and appropriate in judicial administration, there is no reason why an action of ejectment might not be brought in a county or even a state other than that of the situs of the land.<sup>119</sup> Moreover, among the actions which have been liberated from the conditions which once made them local, some are nevertheless not freely triable in every court of competent jurisdiction because, as we have noted, other considerations of policy, or supposed policy, operate restrictively. Mr. Chief Justice Marshall observed, discussing the development of the doctrine of locality in England:

This however being not a statutory regulation, but a principle of unwritten law, which is really human reason applied by courts, not capriciously, but in a regular train of decisions, to human affairs, according to the circumstances of the nation, the necessity of the times, and the general state of things, was thought susceptible of modification—and judges have modified it.<sup>120</sup>

In short, it is not possible to tell whether an action, or cause of action, is local or transitory merely by examination of it; it is necessary to determine what considerations of legal policy limit the freedom of the plaintiff to obtain trial in courts otherwise competent. And, in modern times, the question is not simply whether the action is local or transitory, but, more broadly: Where may this action be brought?

The question may arise on the purely domestic level, as it did in the first instance in England. On this level it is very likely to be answered by statutory venue provisions, supplemented, perhaps, by the common-law distinction between local and transitory actions. It may also arise on the interstate (or international) level, and here the problem becomes complex because the legal policies of two or more states may be involved. Historically, the

---

<sup>118</sup> *Mostyn v. Fabrigas*, 1 Cowp. 161, 176, 98 Eng. Rep. 1021, 1029-30 (K.B. 1774).

<sup>119</sup> See 1 ANNUAL PRACTICE order 36, rule 10 (1958); 28 U.S.C. § 1404(a) (1952); cf. *Spencer v. Lapsley*, 61 U.S. (20 How.) 264 (1857). But cf. *Arvidson v. Reynolds Metals Co.*, 107 F. Supp. 51 (W.D. Wash. 1952).

<sup>120</sup> *Livingston v. Jefferson*, 15 Fed. Cas. 660, 663 (No. 8411) (C.C.D. Va. 1811).

question on the interstate level has been most frequently presented in terms of whether the court in which the action is brought will or will not entertain it. It would seem appropriate enough for the question thus presented to be determined by the law of the forum,<sup>121</sup> since, in the absence of a higher law, the forum state is free to entertain a foreign cause of action or not as its own convenience and other interests dictate (it being understood that such interests may counsel a due regard for feasibility and for the legitimate concerns of other states). In fact, however, few decisions since John Marshall's time exhibit his awareness that the question is one of practical policy; most courts, at least so far as their opinions disclose, have been content to determine the question simply by inquiring whether the action is "local" or "transitory" — thus assuming either that there is an inherent difference between the two kinds of action or that the policy considerations which were pertinent in England in the eighteenth century and earlier retain their validity for other times and places.<sup>122</sup>

The exclusionary policies of Wisconsin, Illinois, and Ohio which have been considered in Part II were, of course, efforts by forum states to limit the mobility, or transitory character, of certain causes of action. In effect, each of these states said: So far as we are concerned, the actions in question are local; they will not be entertained in this state. In two of the three instances, these efforts were frustrated by the Supreme Court. We have now to consider the relatively rare phenomenon of an attempt by a state other than that of the forum to localize a cause of action.<sup>123</sup>

---

<sup>121</sup> *Holmes v. Barclay*, 4 La. Ann. 63 (1849).

<sup>122</sup> See *Albert v. Fraser Cos.*, 11 Mar. Prov. 209, [1937] 1 D.L.R. 39 (N.B. 1936); *British South Africa Co. v. Companhia de Moçambique*, [1893] A.C. 602; *Willis, Jurisdiction of Courts — Action to Recover Damages for Injury to Foreign Lands*, 15 CAN. B. REV. 112 (1937); cf. *Mannville Co. v. City of Worcester*, 138 Mass. 89 (1884). There are occasional exceptions. *Reasor-Hill Corp. v. Harrison*, 220 Ark. 521, 249 S.W.2d 994 (1952), 65 HARV. L. REV. 1242 (1952); *Little v. Chicago, St. P., M. & O. Ry.*, 65 Minn. 48, 67 N.W. 846 (1896). Similarly, a few courts have broken sharply with other formulas for refusing to entertain foreign causes of action, such as that excluding actions for taxes due a foreign state. *City of Detroit v. Gould*, 12 Ill. 2d 297, 146 N.E.2d 61 (1957); *State ex rel. Oklahoma Tax Comm'n v. Rodgers*, 238 Mo. App. 1115, 193 S.W.2d 919 (1946); See Note, 7 NAT'L B.J. 354 (1949); RESTATEMENT, CONFLICT OF LAWS § 610 (Supp. 1948).

<sup>123</sup> The discussion will be limited principally to statutory attempts, since attempts to prevent the prosecution of an action in another state by injunction involve the problem of full faith and credit to judgments. See *James v. Grand*

In 1903 the legislature of New Mexico, overriding the governor's veto, embarked upon an ambitious plan to localize all causes of action for personal injury or wrongful death suffered in the territory. The reason for the plan was candidly stated in a preamble: It had become customary for such actions to be brought in other states and territories, "to the increased cost and annoyance and manifest injury and oppression of the business interests of this territory and the derogation of the dignity of the courts thereof."<sup>124</sup> The act provided that there should be no civil liability under either the common law or any statute of the territory for personal injury or death suffered therein unless, *inter alia*, action should be filed within one year in a district court of the territory.<sup>125</sup> This "condition precedent" was expressly made "a part of the law under which [a] right to recover can exist for such injuries . . . ."<sup>126</sup> The second section of the act gave the initiative to the tortfeasor; he could summon the aggrieved person into court, requiring him to file his complaint then and there, and upon default could obtain an adjudication on the issues of liability and damages.<sup>127</sup> Other sections provided for expediting trial in New Mexico and for injunction where the aggrieved party sued or threatened to sue elsewhere.<sup>128</sup> After the passage of the act one Sowers, a resident of Arizona, was injured in New Mexico while employed as a brakeman by the Atchison, Topeka & Santa Fe—a Kansas corporation. He brought his action in Texas and prevailed notwithstanding a defense which set forth the localizing statute and invoked the full-faith-and-credit clause.<sup>129</sup> The Supreme Court in *Atchison, T. & S.F. Ry. v. Sowers*<sup>130</sup> affirmed, Mr. Justice Day writing for the majority and Justices Holmes and McKenna dissenting. The

---

Trunk W.R.R., 14 Ill. 2d 356, 152 N.E.2d 858, *cert. denied*, 358 U.S. 915 (1958). Despite the holding in *Pere Marquette Ry. v. Slutz*, 268 Mich. 388, 256 N.W. 458 (1934), the Michigan venue statute involved in the *James* case is not here regarded as a statutory effort by the state of the transaction to impair the interstate mobility of the cause of action. See Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405, 425 (1955).

<sup>124</sup> N.M. Laws 1903, ch. 33, at 51. The act was subsequently annulled by Congress. See *Atchison, T. & S.F. Ry. v. Sowers*, 213 U.S. 55, 63 (1909).

<sup>125</sup> N.M. Laws 1903, ch. 33, § 1, at 51.

<sup>126</sup> N.M. Laws 1903, ch. 33, § 1, at 52.

<sup>127</sup> N.M. Laws 1903, ch. 33, § 2, at 52.

<sup>128</sup> N.M. Laws 1903, ch. 33, §§ 3, 4, at 53.

<sup>129</sup> *Atchison, T. & S.F. Ry. v. Sowers*, 99 S.W. 190 (Tex. Civ. App. 1906).

<sup>130</sup> 213 U.S. 55 (1909).

opinion of the Court is a remarkable one. While recognizing — indeed, while in one respect overstating<sup>131</sup> — the federal obligation of Texas to give full faith and credit to the public acts of New Mexico, the Court said simply, in effect: The rights of action for personal injuries created by New Mexico law for personal injury and death are transitory and, while New Mexico has full power to create and modify those rights, nothing it can do will change their transitory character.<sup>132</sup> If our brief review of the distinction between local and transitory actions has served any purpose, it must have demonstrated that whether or not an action is transitory depends upon some particular body of law and legal policy rather than upon any examination into the “nature” of the cause of action. Upon what law did the Supreme Court rest its determination that this cause of action for personal injuries was transitory, so that it could be prosecuted in Texas? The most charitable answer would be that it rested upon the law of the forum.<sup>133</sup> As we have seen, it is not unreasonable for the forum to look to its own law in such matters, in the absence of higher law; but the Supreme Court was not sitting as a court of the forum. It sat as a national court whose jurisdiction had been invoked to resolve a conflict between the laws and policies of two coordinate jurisdictions.<sup>134</sup> It is not enough to justify the decision, therefore, that the Court applied the law of the forum. On what basis did it make this choice of law, thereby subordinating the policy of New Mexico to that of Texas?

The least charitable answer would be that the Court was re-

---

<sup>131</sup> Mr. Justice Day erroneously attributed to the Act of 1790, 1 Stat. 122, as amended, 28 U.S.C. 1738 (1952), a provision requiring that the public acts of a state shall be given such faith and credit as they are entitled to in the state from which they are taken. 213 U.S. at 64, 65. See Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958).

<sup>132</sup> “An action for personal injuries is universally held to be transitory, and maintainable wherever a court may be found that has jurisdiction of the parties and the subject matter.” 213 U.S. at 67.

<sup>133</sup> “Each State may . . . determine the limits of the jurisdiction of its courts, the character of the controversies which shall be heard in them, and specifically how far it will, having jurisdiction of the parties, entertain in its courts transitory actions where the cause of action has arisen outside its borders.” 213 U.S. at 70, quoting from *St. Louis, I.M. & S. Ry. v. Taylor*, 210 U.S. 281, 285 (1908). (Author’s omissions.)

<sup>134</sup> The Act of 1804, 2 Stat. 298, as amended, 28 U.S.C. § 1739 (1952), was properly relied on as placing the public acts of the territories on the same footing as those of the states for purposes of full faith and credit. 213 U.S. at 64-65.

lying on natural law: A transitory cause of action may be prosecuted anywhere, and anyone can examine this cause of action and tell that it is transitory; its *nature* is such that it follows the person of the defendant. A fairer answer would be that confronted with a delicate question involving the statecraft of federalism, without guidance from Congress, the Court did not rise to the occasion but succumbed to the forces of inertia and resolved the question simply by reference to common-law precedents. Those precedents, based as they were on the efforts of the English courts to work out a practical policy for their own time and country, had little to offer by way of guidance to the highest court in our modern federal system. Predominantly they were concerned with determining the reaction of an English court to actions based upon foreign events;<sup>135</sup> the distinctions between local and transitory actions were worked out from the point of view of the forum, so that from the moment the Court decided to rely upon them a bias in favor of the forum state was injected into the deliberations. Moreover, the circumstance that the foreign state had explicitly avowed a purpose to localize the action was a novel one; and, in any event, the English courts had never been called upon to consider, as a court in a federal system must consider, the deference which may be owing as a matter of supreme law to the policy of the foreign state.

This relative abdication was prompted not only by a disinclination to venture upon the delicate task of formulating principles of federalism but also by the Court's failure to distinguish between its function as arbiter of interstate conflicts and its function as exponent of a federal common law. "*It is then the settled law of this court,*" said Mr. Justice Day, "that in such . . . actions the law of the place is to govern in enforcing the right in another jurisdiction, but such actions may be sustained in other jurisdictions when not inconsistent with any local policy of the State wherein the suit is brought"<sup>136</sup> — citing a case in which the Court had held that an action for the death of a person in Maryland could be maintained in the District of Columbia.<sup>137</sup>

---

<sup>135</sup> See Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405, 489-90 (1955); cf. McKenna v. Fisk, 42 U.S. (1 How.) 241, 248-49 (1843). In a leading case, Turner, J., refused to enjoin prosecution of an action abroad. Pennell v. Roy, 3 De G.M. & G. 126, 43 Eng. Rep. 50 (C.A. 1853); cf. Cole v. Cunningham, 133 U.S. 107, 117 (1890).

<sup>136</sup> 213 U.S. at 67-68. (Emphasis added.)

<sup>137</sup> Stewart v. Baltimore & O.R.R., 168 U.S. 445, 448 (1897).

In that case, as also in the diversity case relied upon by the Court,<sup>138</sup> no constitutional question was presented. The Court sat simply as the highest court of the forum, and enunciated the policy which was to be binding upon lower courts of the forum with respect to causes of action which were, with respect to them, "foreign." The citation of such cases in support of a formulation of "the settled law" of the Court is eloquent testimony that the Court was insufficiently sensitive to the distinctiveness of its role in a case involving the full-faith-and-credit clause.<sup>139</sup>

Substantially the same problem was presented to the Court in *Tennessee Coal, Iron & R.R. Co. v. George*.<sup>140</sup> The Alabama Employers' Liability Act<sup>141</sup> modified the common law of master and servant relating to personal injuries, but the Alabama Code provided that all actions under that act "must be brought in a court of competent jurisdiction within the State of Alabama, and not elsewhere."<sup>142</sup> George, apparently a resident of Alabama, was injured in the course of his employment in Alabama, and brought his action by attachment against the employer—an Alabama corporation—in Georgia. Notwithstanding a defense invoking the restrictive provision of the Alabama Code and the full-faith-and-credit clause, the Georgia courts gave judgment for the plaintiff, and the Supreme Court affirmed. Counsel attempted to distinguish the *Sowers* case on the ground that there common-law rights were involved, whereas here the right sued upon was created by a statute which at the same time circumscribed the right.<sup>143</sup> The suggestion was brushed aside.<sup>144</sup> The

---

<sup>138</sup> *Dennick v. Railroad Co.*, 103 U.S. 11 (1880).

<sup>139</sup> For another instance of the same phenomenon, including the same unitary concept of the "law of this Court," see *Western Union Tel. Co. v. Brown*, 234 U.S. 542, 547 (1914), discussed in Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 69 (1958).

<sup>140</sup> 233 U.S. 354 (1914).

<sup>141</sup> Ala. Civ. Code § 3910 (1907), as amended, ALA. CODE tit. 26, § 326 (1940).

<sup>142</sup> Ala. Civ. Code § 6115 (1907). This provision was added to the Code after the passage of the liability act, but was treated throughout as if it had been "part and parcel of the statute creating the cause of action." *Tennessee Coal, Iron & R.R. Co. v. George*, 11 Ga. App. 221, 224, 75 S.E. 567, 568 (1912).

<sup>143</sup> 233 U.S. at 357.

<sup>144</sup> "But that distinction marks no difference . . . because in New Mexico, common-law liability is statutory liability—the adopting statute . . . providing that 'the common law as recognized in the United States of America shall be the rule of practice and decision.'" 233 U.S. at 361. Furthermore, the *Sowers* deci-

reasoning is much the same as that in *Sowers*, with the natural-law flavor perhaps a bit more obtrusive:

. . . a State cannot create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any court having jurisdiction. That jurisdiction is to be determined by the law of the court's creation and cannot be defeated by the extraterritorial operation of a statute of another State, even though it created the right of action.<sup>145</sup>

Conceivably, these two decisions may be read as having quite limited significance. In one light, they hold no more than that a state's decision to entertain a foreign cause of action, at least of a type traditionally regarded as transitory, violates no constitutional principle despite statutory attempts by the state of the transaction to localize the right of action. That was a proposition fairly consistent with contemporary views as to the function of the full-faith-and-credit clause. The effect of the clause with respect to public acts of sister states was late in being recognized, and even now has not been determined in anything like a definitive way.<sup>146</sup> This view of the matter is reinforced by the fact that, on a fair reading of these cases, the full faith and credit which the Court conceded was required to the public acts of a sister state was of a rather limited kind. One would hardly be warranted in inferring from either case that the state of the forum

---

sion had not been based on the common-law character of the right asserted but on the general principles relating to transitory actions. *Ibid.*

<sup>145</sup> 233 U.S. at 360. The circularity of the reference to "extraterritorial operation" is evident from the Court's immediately preceding statement that "the courts of the sister State trying the case would be bound to give full faith and credit to all those substantial provisions of the statute which inhered in the cause of action or which name conditions on which the right to sue depend [*sic*]." *Ibid.*

At one point, the Court seems to suggest that the action derived its interstate transitory character from the fact that it was transitory within Alabama. 233 U.S. at 359. Surely, however, it cannot be inferred that the result would have been different if the statute had prescribed that suit be brought in a particular county of Alabama. The New Mexico statute involved in *Sowers* had most particularly prescribed a local venue. N.M. Laws 1903, ch. 33, § 1, at 51. A slight suggestion of the notion of due process was introduced when the Court observed that under the restrictive provision the plaintiff might be deprived of a remedy if the defendant should leave the state. 233 U.S. at 359. But the New Mexico statute in *Sowers* was explicitly made inapplicable where the defendant could not be validly served within the territory, N.M. Laws 1903, ch. 33, § 5, at 54, and this provision did not save the statute.

<sup>146</sup> See generally Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958).



was *required* by the full-faith-and-credit clause to entertain the cause of action; in its concessions concerning the effect of the clause the Court seems to be saying no more than that, if the forum elects to entertain the cause of action under foreign law, it must respect the limitations and conditions imposed by the foreign law, and, in particular, must not enlarge the obligation of the defendant.<sup>147</sup> Although some language might support a contrary inference,<sup>148</sup> there was no holding that the localizing statutes were void, but only that other states were not bound to respect them.

Despite the element of reasonableness in this position, the two cases cannot be so lightly and comfortably dismissed. The Supreme Court has now held, or apparently held, in the *Hughes* and *United Air Lines* cases that the full-faith-and-credit clause compels the forum to entertain transitory causes of action asserted under the laws of a sister state — at least causes of action for wrongful death. This being so, we are left without a satisfactory explanation of the paradox: full faith and credit to the public acts of the sister state requires the forum to entertain an action to enforce rights created by those acts, but does not require respect for other provisions of those acts — even, it seems, if they are contained in the same statute — purporting to confine the right of action to the state of the transaction.

It is by no means enough to resolve this paradox to argue that the “venue” of the action is “procedural,” or relates to the “remedy,” and so is governed by the law of the forum.<sup>149</sup> In order to approach a solution, it is necessary first of all to recall that, as Part II was designed to demonstrate, the Supreme Court’s holdings in *Hughes* and *United Air Lines* do not by any means go so far as has just been suggested. Those cases do not estab-

---

<sup>147</sup> See *Tennessee Coal, Iron & R.R. Co. v. George*, 233 U.S. 354, 360 (1914); *Atchison, T. & S.F. Ry. v. Sowers*, 213 U.S. 55, 67-70 (1909); cf. *Tennessee Coal, Iron & R.R. Co. v. George*, 11 Ga. App. 221, 230, 75 S.E. 567, 571 (1912); *Atchison, T. & S.F. Ry. v. Sowers*, 99 S.W. 190, 192 (Tex. Civ. App. 1906).

<sup>148</sup> “Of course, the Territory of New Mexico could pass no law having force and effect over persons and property without its jurisdiction. *Pennoyer v. Neff*, 95 U.S. 714, 722; *Story on the Conflict of Laws*, § 539.” *Atchison, T. & S.F. Ry. v. Sowers*, 213 U.S. 55, 70 (1909). It should be observed here that a judgment obtained by the putative tortfeasor under § 2 of the New Mexico statute is entitled to full faith and credit. *Buttrick v. El Paso N.E. Ry.*, 93 S.W. 676 (Tex. Civ. App. 1906).

<sup>149</sup> Cf. *Tennessee Coal, Iron & R.R. Co. v. George*, 233 U.S. 354, 359 (1914).

lish that every transitory action, even for wrongful death, which is predicated on the laws of a sister state must be entertained by the forum. Those were cases in which the relationship of the parties to the forum state was such that that state had an interest in applying its policy with respect to wrongful death; in which the withholding of a remedy amounted to an arbitrary discrimination by the forum state against a class of its own residents; and in which the result could, and should, have been reached without any reliance whatever on the full-faith-and-credit clause. Does anyone really believe that those cases have abolished the freedom of a state to invoke the doctrine of forum non conveniens in what may be called the "pure" case for invocation of that doctrine, *i.e.*, an action between nonresidents for personal injuries inflicted elsewhere?<sup>150</sup> The Court has held no more than that in certain circumstances a state may not close its doors to claims based upon out-of-state transactions. What such circumstances are, beyond those presented in the decided cases, is a question to be answered with the aid of discriminating and realistic legal analysis; the oversimplification that goes with easy generalization will not serve.

The answer to the problem posed by the *Sowers* and *George* cases, like the answer to the problem posed by the *Hughes* and *United Air Lines* cases, and also like the answer to the problem of federal control of choice of law by state courts, is to be sought through an analysis of the policies and interests of the states involved. The essential meaning of full faith and credit to public acts is that each state must yield to every other the prerogative of managing its own concerns. The determination of what matters are within the legitimate concern of a state is realistically made not by reference to territorialist dogma and common-law precedent but by reference to the legal policies of the state and the circumstances in which the execution of such policies is reasonable.<sup>151</sup> When it is plain that only one of the states associated with a case has a legitimate interest in the application of its policy, the Constitution requires recognition of the law of that state. When more than one state has a legitimate interest, a problem is presented which cannot appropriately be resolved

---

<sup>150</sup> See note 112 *supra*; cf. *James v. Grand Trunk W.R.R.*, 14 Ill. 2d 356, 362, 152 N.E.2d 858, 861-62, *cert. denied*, 358 U.S. 915 (1958).

<sup>151</sup> See generally Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958).

through the judicial process alone, but only by congressional action; and in the absence of congressional guidance the application of the law of any interested state should not be disturbed.<sup>152</sup>

Assume that, other circumstances in *Hughes v. Fetter* being the same, the Illinois wrongful-death statute had contained a provision that the right of action thereby created could be enforced only in a court of competent jurisdiction in Illinois, and not elsewhere. It is abundantly clear that the result which the Court reached should not be affected in the slightest: Wisconsin not only may, but must, entertain the plaintiff's claim for damages. This proposition is supportable simply on the basis of the superficial holdings attributable to the cases: (1) that the full-faith-and-credit clause requires a state to entertain a transitory cause of action predicated on the law of a sister state if no plausible public policy can be adduced to support the refusal to do so; and (2) that a state cannot create a "transitory" cause of action and at the same time place limits upon its mobility. The proposition is more intelligibly supported by an analysis of the respective interests of the states, such as was essayed in Part II. We have already seen that Wisconsin had a policy with respect to wrongful death which, logically and impartially administered, should have extended to the case at bar, and that the refusal so to extend it was an arbitrary and capricious discrimination. The same reasoning which underlies that conclusion leads also to the proposition that Wisconsin had an interest in providing a forum in which the remedy could be pursued and that Illinois had no interest in limiting the possible forums in such a way as to exclude Wisconsin. All the parties being domiciled and resident in Wisconsin, that state had a clear interest in applying its basic policy that local tortfeasors should pay compensation for the deaths of local victims, and an equally clear interest in providing a forum at home for the enforcement of that policy. The only conceivable policy which might be expressed in the hypothetical effort by Illinois to localize the action would be one of making work for the local bar.<sup>153</sup> That, however, is not a policy which is likely to be explicitly avowed; it would have no relation to

---

<sup>152</sup> *Ibid.*

<sup>153</sup> This leaves out of account the possibility, as conceded in note 51 *supra*, that Illinois might have a policy of deterring negligent conduct within the state by imposing liability. At most, such a policy would justify Illinois in providing a forum, and would not justify her attempt to exclude a Wisconsin forum,

the governmental policies involved in the wrongful death statute; and it ought to be regarded as a collateral, venal, and predatory policy, entitled to no recognition for constitutional purposes.<sup>154</sup>

On the other hand, consider the converse fact situation presented by *James v. Grand Trunk W.R.R.*<sup>155</sup> Assuming that Michigan, the state in which the injury had occurred, in fact had a statutory policy, as the Michigan court declared, of confining the remedy to local courts, there is every reason why that policy should be respected by Illinois since, as the home state of all the parties, Michigan had a legitimate interest in the application of its policy and Illinois had none whatever in the application of its contrary policy, if any.<sup>156</sup> The policies conceivably attributable to Illinois appear to be: (1) the overly generous one of making Illinois justice available to all men everywhere and (2) the not-to-be-avowed one of making the courts of Chicago a national arena for the trial of personal-injury cases, to the delight and profit of the local bar and its entourage. The second of these should be ruled out on grounds which have already been suggested. The first is more subtle, since it suggests altruism and a passionate desire to avoid discrimination and has an air, moreover, of concern for the administration of the local court system. Apart from the fact that such a policy is in marked contrast to that pursued by Illinois for half a century, of excluding such actions even when the victims were citizens of Illinois, and also to the concurrent Illinois policy of *forum non conveniens*, it should be clear that the apparent justifications for such a policy are spurious. The legitimate policies of a state concerning its judicial system tend to protect the system against being overburdened or abused, and it would be difficult to make a plausible case for the proposition that Illinois justice would be frustrated if its courts were not operated as sanctuaries for forum-shoppers.

---

<sup>154</sup> Cf. 38 Stat. 1164, 1165 (1915), as amended, 46 U.S.C. § 597 (1952); *Strathearn S.S. Co. v. Dillon*, 252 U.S. 348 (1920); *ZEIS, AMERICAN SHIPPING POLICY* 70 (1938). See also Nademann, *Creditor Equality in Inter-State Bankruptcies: A Requisite of Uniformity in the Regulation of Bankruptcy*, 98 U. PA. L. REV. 41 (1949).

<sup>155</sup> 14 Ill. 2d 356, 152 N.E.2d 858, cert. denied, 358 U.S. 915 (1958). See note 113 *supra*.

<sup>156</sup> A fortiori, Illinois should have been required to respect the Michigan judgment since, even if the court had erroneously calculated the interests involved, such error is of a type correctible only upon direct review. Cf. *Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939). See generally Langmaid, *The Full Faith and Credit Required for Public Acts*, 24 ILL. L. REV. 383 (1929).

As for the avoidance of provincialism and discrimination, that is a very laudable objective indeed; but there is a point at which the desire to treat everyone alike, according to one's own standards, ceases to be laudable impartiality and becomes mere officious intermeddling with the concerns of others.<sup>157</sup>

Admittedly, there is little in the cases on access to courts to support this sort of analysis. Reason nevertheless demands that one seek a defensible alternative to the course followed by the Illinois Supreme Court when it enjoined enforcement of a judgment which would have interfered with the prosecution in Illinois of an action which in the normal course of events would have been dismissed on *forum non conveniens* grounds.<sup>158</sup> If we turn to the two cases directly in point, we must conclude that the decision in *George* was directly in conflict with the analysis here suggested: So far as can be ascertained, all parties and events were associated with Alabama, and Georgia had no interest whatever in burdening its courts with an attachment proceeding, thereby interfering with the policy which Alabama had established for its own people. The case cannot be reconciled with the thesis of this paper. It can, however, be criticized, as has been suggested, on the ground that its rationale ignores the needs of the federal system and concentrates instead upon common-law precedents which are surely not decisive. Much the same must be said of the *Sowers* case. Assuming that the Kansas railroad corporation which was the defendant was one of those local "business interests" for the protection of which the localizing statute was enacted, all of the circumstances relevant in determining whether New Mexico had an interest in the application of its policy would lead to an affirmative answer except one: The injured plaintiff was a resident of Arizona. That circumstance does not undermine New Mexico's interest: If the state has an interest in protecting local enterprises against local resi-

---

<sup>157</sup> Cf. *New York Life Ins. Co. v. Head*, 234 U.S. 149 (1914), discussed in *Currie, The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 38 (1958).

<sup>158</sup> *James v. Grand Trunk W.R.R.*, 14 Ill. 2d 356, 152 N.E.2d 858, *cert. denied*, 358 U.S. 915 (1958). On a different level of legal analysis, an explanation of the court's otherwise strange behavior might be found (1) in the fact that the Michigan court's injunction, employed as a substitute for a plea of *forum non conveniens* addressed to the Illinois court, had a provocative effect and (2) in certain circumstances suggesting that the plaintiff's rights were unlikely to be adequately protected in Michigan. See *id.* at 359-61, 152 N.E.2d at 860-61.

dents, it has at least the same interest in protecting them against nonresidents. But the circumstance does not support an interest on the part of Texas. If Sowers had sued in his home territory, Arizona might reasonably have asserted its own policy of providing a forum notwithstanding the contrary policy of the territory interested in the defendant. Texas, however, did not even inquire what the policy of Arizona might be; it relied solely on its own open-door policy — one which, in the circumstances, it had no legitimate interest whatever in maintaining.

Although the Supreme Court has said nothing to support the interest analysis in these cases, there are some indications in the decisions of the state courts of awareness that the problem is one which ought to be approached in such terms. Thus Justice Schaefer, while dissenting in the *James* case, emphasized that "Illinois has no connection whatever with the occurrences out of which the administrator's claim arose."<sup>159</sup> And the Texas Court of Civil Appeals said in the *Sowers* case:

It may be that the lawmaking power of a state may have the power to declare that there shall be no right of action for damages arising from personal injuries inflicted through the negligence of persons or corporations within its bounds, and, however unjust and iniquitous such laws might be, they should be recognized and respected by the courts of other states. A state would have the authority to pass laws compelling *its injured citizens* to fully disclose their evidence and line of complaint to the negligent party, and to give notice within a certain time of claims for damages, and sister states would recognize the validity of such laws. The section of the law under consideration, however, goes farther than the extreme measures indicated, and attempts not only to prohibit its citizens, but all parties, who are so unfortunate as to be injured within its territorial limits, from exercising the right, accorded in England, the states of the American Union, and other civilized countries, of instituting such actions wherever the guilty party may have his or its domicile.<sup>160</sup>

---

<sup>159</sup> 14 Ill. 2d at 375, 152 N.E.2d at 868.

<sup>160</sup> *Atchison, T. & S.F. Ry. v. Sowers*, 99 S.W. 190, 192 (Tex. Civ. App. 1906), *aff'd*, 213 U.S. 55 (1909). (Emphasis added.) The fact that injunctions against prosecuting civil actions outside the state are ordinarily directed only against local residents is significant, as is also the fact that such injunctions are frequently associated with the desire of the local resident to gain advantage in some feature of the law which will be applied by the foreign forum. See Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405, 471-73, 486-87 (1955).

If, as is almost certainly the case, the freedom of a state to employ the doctrine of *forum non conveniens* in a "pure" situation has survived the decisions in *Hughes* and *United Air Lines*, it must be because the forum state has no interest in entertaining the action and, in fact, has a countervailing interest in protecting its courts against the burdens and abuses entailed by such litigation. If this is recognized, it should not be difficult to recognize a correlative interest, on the part of the state with which all the parties and events are associated, in the application of its declared policy of keeping such litigation at home. In other words, far from having been rendered obsolete by the *Hughes* and *United Air Lines* cases, the doctrine of *forum non conveniens* may now be obligatory, at least where the state which is solely concerned has enunciated a localizing policy.

Finally, we are now in position to respond to the doubt expressed by Mr. Justice Holmes in his dissenting opinion in *Sowers*. Characteristically, this leading exponent of the *obligatio* theory assumed that the law of the state of injury has both power to give and power to take away, without regard to the possible limitations of a federal constitution:

The Territory could have abolished the right of action altogether if it had seen fit. It said by its statute that it would not do that, but would adopt the common law liability on certain conditions precedent, making them, however, absolute conditions to the right to recover at all. One of those conditions was that the party should sue in the Territory. Section 1. A condition that goes to the right conditions it everywhere. . . . [I] do not see why the condition in §1 was not valid and important. If it had been complied with there might have been a different result.<sup>161</sup>

The answer is that while a state is free to determine for its own domestic purposes in what circumstances liability will be imposed for personal injuries, it does not have final authority, in this federal system, to determine the effect in other states of the laws which it enacts for that purpose. Under the full-faith-and-credit

---

<sup>161</sup> 213 U.S. at 71. Conceivably, Holmes may have meant that so long as the plaintiff complied with the literal condition by filing suit in New Mexico within the time specified, he could proceed to sue and recover in another state provided the case in New Mexico did not go to judgment first. Such a reading of the statute, however, would seem to be trifling with its clear purpose, declared in § 3, to make suit outside the state "unlawful." N.M. Laws 1903, ch. 33, § 3, at 53. See Davis, *Where May the Injured Sue?* 2 VA. L. REV. 33, 46-48 (1914).

clause the effect in one state of the public acts of another is a federal question. Congress is given explicit power to prescribe that effect by general laws. In the absence of such congressional legislation the Court can function effectively to determine what effect is appropriate where one state has an interest in the application of its law and the other has none. It cannot function effectively where the legitimate interests of two states are in conflict. But in any event the determination of such effect is to be made by federal authority and on federal principles. Clear recognition of this fact would disembarass the future development of the law of two equally stultifying notions: that the matter is one to be determined solely by the law of the forum, and that it is one to be determined solely by the law of the place of injury.<sup>162</sup>

*(Part II of this article will be published in the December issue.)*

---

<sup>162</sup> In this connection it may be noted that the feckless attempt of the revisers of the Judicial Code in 1948 to have Congress exercise its powers under the full-faith-and-credit clause with respect to public acts contributes nothing to the solution of the problem under discussion. The implementing act, thanks to the ingenuity of the revisers, provides: "Such Acts . . . shall have the same full faith and credit . . . as they have by law or usage in the courts of such state . . . from which they are taken." 28 U.S.C. § 1738 (1952). If this means anything (which is doubtful, since the question of the effect in other states of the localizing statute is not likely to arise in the courts of the enacting state, see *Atchison, T. & S.F. Ry. v. Sowers*, 99 S.W. 190, 192 (Tex. Civ. App. 1906), *aff'd*, 213 U.S. 55 (1909)), it produces the absurdity that each state must defer to the law of the other. See *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532, 547 (1935).